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REPORTS OF CASES

ARGUED AND DETERMINED

IN THE

SURROGATES' COURTS

OF THE

STATE OF NEW YORK.

BY

AMASA A. REDFIELD,

COUNSELLOR AT LAW.

VOL. I.

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THE publisher has been induced by the success which has attended the series of Surrogates' Reports begun by Mr. Surrogate BRADFORD, and the fact that no similar series of Reports, embracing cases of Surrogate or Probate-law exclusively, exists in this country, to continue the series, somewhat enlarging their scope.

It is intended to include cases of value determined in the several Surrogates' Courts of this State, and also cases in the Supreme Court, and Court of Appeals, turning on questions of Probate-law purely, and which are of permanent value in this branch of the law.

In the preparation of the present volume the editor has enjoyed the advantage of Judge BRADFORD's valuable co-operation, and especially in the preparation of the highly important case of *DeLafield v. Parish*.

The table of *Cases Cited*, prefixed to the volume, is deemed to be of no little value to the working lawyer;—the usefulness of such a table having long been recognized by the British Reporters.

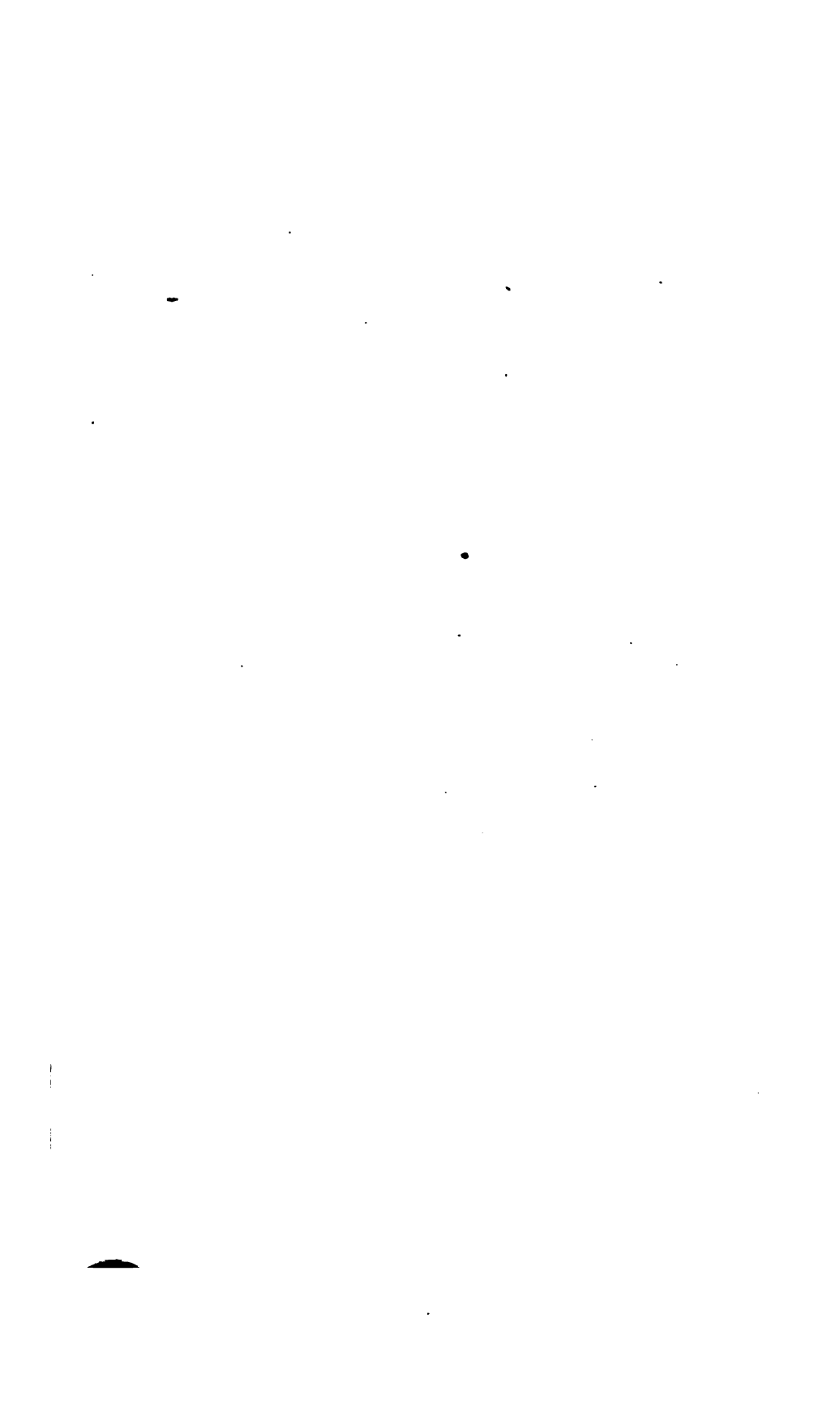


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REPORTS OF CASES
ARGUED AND DETERMINED
IN THE
SURROGATES' COURTS
OF THE
STATE OF NEW YORK.

NEW YORK COUNTY—HON. ALEXANDER W. BRADFORD, SURROGATE—
December, 1857.

DELAFIELD *v.* PARISH.

*In the Matter of Proving the Last Will and Testament of
HENRY PARISH, deceased.*

A mere intention to revoke a will never effectuates an express revocation.

The most satisfactory evidence that the testator had repeatedly and explicitly declared a deliberate design to annul or destroy his will previously made, would not authorize the court to reject the instrument. A written statement to that effect, in the testator's handwriting, is not a valid revocation, unless celebrated according to the forms prescribed by the statute.

A legal act of revocation must be performed *animo et facto*. There must concur both the intention and the act. Intention, or mere purpose, to become legally operative, must be expressed in a legal way. To design to do, and to do, are not the same. The act implies and embraces the intention, but the mere naked intention does not include and comprise the act.

At common law there could be a revocation of a will implied from circumstances.

There were two classes of such implied revocations: *First*. Such as were declared by the law, in view of a change in the testator's circumstances, especially his family relations, since the execution of the will, and which effected a total revocation of the will and all its dispositions. This class was received in consideration by the probate courts. It was accordingly an established rule that marriage, and the birth of issue, effected an implied revocation of a previous will.

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Ultimately the birth of children (without a subsequent marriage after the will was made), in conjunction with other alterations in the testator's circumstances, was held sufficient to establish an implied revocation.

An alteration in the testator's circumstances, when that alteration did not include as one of its essential ingredients either marriage, or the birth of issue, has never been held to revoke a previous will.

Second. The second class of implied revocations at common law were revocations by alienation of property, or such acts of the testator in regard to his property, as indicated an intention to exempt it from the dominion of the will. These revocations were implied from the testator's dealing with the property which was the subject of testamentary gift, and their extent was consequently commensurate with the dealing. This class of revocations only affected the property devised, and did not produce a revocation of the will *per se*; and therefore such cases never came within the purview of the probate courts.

The whole subject of implied revocations in the State of New York, is now controlled by statute, and no implied revocations are admitted except those enumerated in the Revised Statutes.

The will of a competent testator stands as the reason for the act, and requires no other evidence to support it, than proof of due execution according to the ceremonies prescribed by law.

But a different degree and class of proof are required where the will has been made by the intervention of the party profiting by its provisions, and occupying relations of confidence and influence towards a testator of weak or doubtful capacity. For example, where the parties are in the relation of guardian and ward, principal and agent, trustee and *cestui que trust*, attorney and client, the court is exact and scrutinizing in its requisition of the plainest evidence of volition and capacity. Where such relations of confidence exist, and the party frames the instrument for his own advantage and benefit, every presumption arises against the transaction. In such a case, it is not necessary to prove fraud and circumvention, but the proponent must remove the suspicion by clear and satisfactory proof.

The principle involved in this rule must be considered as relating rather to the *quantum* of evidence required in such cases, than to an actual conclusion of fraud in fact.

And in its application it requires from the proponent evidence, outside of the document itself, that the contents were understood by the decedent, and were conformable to his real wishes; that the act was the result of free volition, the actual will, *voluntas ipsa*, of a competent mind—and if from any cause such proof fail, probate must be denied.

Where the testator made with due deliberation and under legal advice his will in the year 1848, whereby, after providing for his wife, and making other legacies, he made his two brothers residuary legatees, the residue at the time being small;

And subsequently in 1849, when such residue had increased very largely, and he had made no change in the will, was seized with apoplexy, and

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after a partial recovery and the exhibition of some degree of intelligence, he made a codicil in favor of his wife, proved to have been conformable in a measure to intentions expressed previous to his illness;—*Held*, that such codicil should be admitted to probate.

Held, also, in respect to subsequent codicils, not supported by any extrinsic evidence of intention prior to his illness, which were made in favor of his wife, while he was in her charge, his faculties were enfeebled and impaired, and his power of communication and mental manifestation greatly affected, that the proof in support of such codicils was deficient, and they should be denied probate.

WM. M. EVARTS and FRANCIS B. CUTTING, for Proponents.

Henry Parish died in the city of New York on the second day of March, 1856. He left a widow, Susan M. Parish, two brothers, James Parish and Daniel Parish, and two sisters, Ann Parish and Mrs. Martha Sherman (wife of Allen M. Sherman), his heirs-at-law and next of kin.

He left a last will of real and personal estate, bearing date September 20th, 1849; a codicil executed August 29th, 1849, and republished December 17th, 1849; a second codicil executed September 15th, 1853; and a third codicil executed June 15th, 1854.

At the date of the execution of his will, Mr. Parish estimated his property at \$732,000

His specific dispositions of property by this will were:

To Mrs. Parish	\$331,000
“ several namesakes	60,000
“ acting executors	30,000
“ his two sisters	40,000
“ Daniel Parish’s seven children . .	70,000
“ James Parish’s six children . . .	60,000
“ Mrs. Kernochan (his cousin) . .	10,000
“ Mrs. Parish’s brothers and sister .	80,000
“ Mrs. Payne (Mrs. Parish’s aunt) .	5,000
“ Mrs. Abeel (his cousin)	10,000
	<hr/>
	696,000
Passing under residuary clause	<hr/> \$36,000

DELAFIELD v. PARISH.

By the thirteenth clause of the will, Daniel Parish and James Parish were made residuary legatees and devisees.

The balance-sheet of the testator's property, in July, 1849, shortly before the execution of the first codicil, shows, after deducting debts and expense account, an estimated estate of \$898,736 53.

At this time, the Barclay-street dwelling-house and the Chambers-street house, both left to Mrs. Parish in the will, had been sold.

By the *first* codicil, the Union-square property, then their place of residence, and a store in Wall-street, are left to Mrs. Parish. Both these parcels of property were acquired after the date of the will.

By the *second* codicil, personal property, consisting of stocks and bonds to a large amount, is left to Mrs. Parish, and \$50,000 is distributed to public charitable uses.

By the *third* codicil Mrs. Parish is made residuary legatee and devisee; and in case she survives the testator, the residuary clause of the will is revoked.

On the 19th day of July, 1849, Mr. Parish suffered an apoplectic stroke, and, as its sequel, continued subject to a paralytic affection until his death.

Joseph Delafield, one of the executors named in the will, propounded it, with the three codicils, for probate. The citations were returned March 31st, 1856, and the examination of the witnesses for the proponent, and for Daniel and James Parish, who contested the three codicils, and of Ann Parish, and of Mrs. Martha Sherman, who contended for a revocation of the will, was continued until July 6th, 1857.

If the will stands, the only parties interested in contesting the codicils are James Parish and Daniel Parish, who will take, under the thirteenth clause of the will, what the codicils respectively purport to dispose of, if they be decreed invalid.

Ann Parish and Mrs. Martha Sherman have no interest in the codicils, or their support or rejection, if the will be sustained. Their rights are unaffected by the codicils.

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The conflicting claims for the distribution of the large estate left by Mr. Henry Parish, arise between the residuary legatees under a will made fourteen years before his death, and when his property was but one-half the amount he left at his death, and the legatee under the codicils, which were made during the last seven years of his life, and the last less than two years before his death.

It is not a competition between heirs or next of kin, as such, and beneficiaries under a will. Both parties claim under the decedent's, not the law's, allotment.

The two brothers of Mr. Parish were made legatees of a contingent residuum of his estate by the will of 1842, which, had it then taken effect, would have given each of them about the same sum as he gave to each of his two sisters, and about the twentieth part of what in the same will he gave his wife. If his subsequent testamentary dispositions of his increased estate made in favor of his wife can be invalidated, and the will of 1842 be applied to the accumulated property of 1856, the brothers will each take about twenty times as much as the sisters, and very much more than the wife.

Their claim, then, is neither under the title, nor according to the apportionment of the law's distribution, nor by the decedent's apportionment, but by favor of misfortune which has perverted the will, in derogation of the equal claims, both in blood and the testator's wish, of the sisters, and the superior claims, both by marriage and the testator's wish, of the wife.

THE FRAME AND PURPOSE OF THE WILL AND CODICILS.

I. The clear plan and purpose of the will are—

1. To dispose of the whole of his estate, as he then valued it, in actual bequests, leaving the residuary clause to take effect upon a possible or inconsiderable surplus.
2. A specific disposition of all his real estate, leaving no part of it to fall into the residuum.
3. To make Mrs. Parish the only successor and representa-

DELAFIELD v. PARISH.

tive of his wealth, in or with whom alone did he contemplate the name, dignity, credit, or prestige of Henry Parish's wealth or social position, as destined or desired to survive him. He gave her \$331,000; and the largest amounts given by his will, otherwise, to a single legatee, are, \$35,000 to his namesake Henry Parish, \$20,000 to each of his sisters, and a probable residuum of about the same amount to each of his brothers.

4. That his whole real estate should go in this direction of representative survivorship in his wife, except such as he devised in the direction of nominal representative survivorship in the persons of his namesakes. The strength of this sentiment with the testator is shown by his leaving,

(1.) No real estate to any of his heirs or blood as such.

(2.) To his nephew Henry Parish, real estate to the value of \$35,000, while to his other nephews he gives but \$10,000 each, and that in the form of money.

(3.) To Henry Parish Kernochan, real estate to the value of \$20,000, as much as he gives to his own sisters, or (in the residuary estimate) to his own brothers.

(4.) To Henry Parish Conrey, a mere namesake, real estate to the value of \$5,000.

(5.) A distinct preference of the name of Parish over the blood, in giving to his brothers' children bequests *per capita*, *nominatim*, and omitting from such remembrance the child of his sister, Mrs. Sherman, in being at the date of his will, and making no such provision for her probable future issue. That issue from her marriage was not absent from his thoughts, appears from the ultimate bequest of the fund in which she had a life-estate to her issue.

(6.) A distribution of what property was spared from the object of ample provision for his wife, and not attracted to his namesakes, into numerous personal gifts (generous and munificent as gifts), rather than such a disposition as would found a fortune for any of his own or of his wife's blood who did not possess one, or would swell the already abundant fortune of any other.

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(7.) An enumeration of his wife's kin in the distribution of these personal gifts on the same footing with his own, and contemplating with satisfaction the ultimate enjoyment by his wife's kindred of the property he bequeathed to her.

(8.) A protection of his wife's interest in the appointment of three of her brothers as executors, placing one of them with one of his own brothers, and his most intimate friend, and providing the other two as the only substitutes in case of vacancies in the executorship.

(9.) A clear apprehension of encroachment by his heirs upon the provisions for his wife, and in subversion of his will, if, by inadvertence or mischance in its provisions, a flaw could be picked in her title to the Louisiana property, and a provision which put his heirs under bond, as it were, to observe her rights and his will.

(10.) A prevailing tone throughout the will, that the existence of residuum was contingent and conjectural, and the full satisfaction, even, of prior legacies, insecure and uncertain; solicitous precaution that his wife's endowment should be free from peril, and that the subsequent legacies should suffer a ratable reduction, if need be, postponing any payment on account of the latter for the lapse of two years to ascertain its safety.

II. The testamentary memoranda and instructions, emphatically present and support the foregoing as the plan and purpose lying in the mind of the testator when making his will.

1. The activity of this sentiment towards his *namesakes* is shown in the meditated limitation of \$75,000, after his wife's death, to Henry Parish, and Henry Parish Kernochan, equally. And again, in the meditated adoption of these same namesakes, as residuary legatees *pari passu* with his brothers, and *in exclusion of his sisters*.

2. The doubtfulness of any residuum is here very apparent, and the precautions against any premature computation to make out one are equally clear.

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3. The testamentary memoranda furnish conclusive evidence that the decedent carefully computed the amount of his property as the preliminary basis of his testamentary dispositions; that he accommodated his fixed bequests to the amount of property thus ascertained, with the intent of exhausting it, but yet so as to avoid the incongruity of exceeding it; and that he adjusted an apparent or expected, though uncertain surplus, not to exceed the provision he had made for his two sisters; that he made a disposition of this apparent, though contingent surplus, in such way that if his property held out to its full measure, a large sum being still of outstanding and estimated mercantile assets, his brothers would take about equally with his sisters.

This computation is indorsed by testator, "estimate of the value of property of Henry Parish, as made 10th September, 1842, in which estimate he distributed his property and made his will, in New York, 20th Sept., 1842."

III. The evidence of Mr. Havens shows—

1. That the preparation of the will was made with great deliberation, and frequent consultations.

2. That the principal sense of obligation and of affection was directed towards his wife, producing a solicitude lest he should fall short of suitable provision for her.

3. That the residuary clause, as it reads, was induced from the general intention that all his property should be disposed of by will, and a preference that his brother Daniel (and not his general heirs) should have the advantage of any contingent surplus. This last sentiment, however, was made to yield to a delicate attention to the feelings of his brother James, that, when the actual gift was to prove more formal than substantial, there should be no room for ill-feeling between them.

4. That he regarded his will as a present disposition of his property, as it then was; the making of his will was presently suggested by his contemplated absence in Europe, and he provided himself with the forms of codicils to meet any occasion that might arise.

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IV. The first codicil shows no departure, in plan or effect, from the frame and purpose of the will.

1. It follows the plan of the will in respect of a specific disposition of all his real estate, the codicil embracing all the real estate which he had acquired since the date of the will, and nothing else. (The Union Square property was purchased while he was in Europe, and the Wall-street building in 1846.)

2. It follows the plan of the will by which all his real estate is devised to Mrs. Parish, which is not given to his namesake.

3. It follows the plan of the will by which their dwelling-house is devised to Mrs. Parish, its operation, so far as the Union Square property is concerned, being to make the will apply to the new dwelling-house, instead of the old one, which had been sold.

4. The increased value and greater style of the substituted dwelling-house, required a new provision of productive fortune to meet the solicitous care for his wife's position which marked his preparation of the will. The devise of the Wall-street property carries out the plan of the will in this regard.

5. The codicil but follows the plan of the will by which his wife is to be the only surviving representative of his fortune; the united provisions of the will and codicil not substantially advancing her proportion of his estate (as it had increased) beyond the proportion under the will as of its date.

V. The testimony of Mr. Havens shows that the first and only new testamentary disposition in the testator's mind, after his return from Europe, was to secure to his wife all his subsequently acquired real estate, viz., the Union Square property (not yet built upon). It was not, then, a question of replacement of one dwelling-house by another, for he still owned and lived in the Barclay-street house.

1. This immediate anxiety to have the newly acquired property taken out of the operation of the residuary clause and given to his wife, is not only confirmatory of the fixed testamentary purposes of the testator in respect of his real

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estate above set forth, but clearly shows that the growth of the residuary fund was neither desired nor designed.

Upon his return from Europe, his property could hardly have increased from its amount at the date of the will (if at all), more than the investment made in the Union Square lots (\$34,000). This proposed devise to his wife, therefore, probably reduced the residuum below its amount when he made the will. This certainly would be its effect, considering the amounts given by Mr. Parish to his brothers Daniel and James on his return from Europe.

But further, the proposed devise of the vacant lots carried, in intent, all the large investment in building and decoration which was then contemplated, and was afterwards made. (The investment, beyond the purchase of the land, afterwards made in the Union Square building, was about \$80,000.) This devise, proposed in the summer of 1844, therefore swept, in intent, all probable accumulation in the residuary fund for a considerable period ahead.

2. This provision for his wife was the only testamentary project named. Daniel was not mentioned.

3. There is no indication in the evidence that the decedent's omission to execute the testamentary purpose in favor of his wife, which, on their return from Europe, he expressed to Mr. Havens, grew from any other cause than the common reasons of procrastinating testamentary acts. The matter was, at the moment, only temporarily postponed for an expected absence from the city.

VI. The second codicil follows the plan of the will, by which his wife is proposed as the sole surviving representative of his wealth in bulk—by which she is to take all his property, but such real estate as pride of name carried to his namesakes, and such wealth as munificence distributed as gifts, not as fortune, with equal hand to the numerous list of collateral relatives by blood and marriage—and by which the residuary fund was intended to be contingent and nominal.

The question, undoubtedly, more prominently than in the

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case of the first codicil, arose as to whether the increment of his fortune should go to his wife, or be in part diffused in additions to the numerous gifts of the will, or go to swell the residuum. It would ill comport with the clear purposes in regard to his property indicated by his will, to have applied its increase to enlarge ratably the bequests to his wife, the gifts to his friends, and the residuary fund, nor would it conform to the natural and probable testamentary dispositions of large wealth by its owner.

The only alternative would seem to be between the wife and the residuary legatees.

All motives of pride, and complacency of wealth, would point to an accretion of his accumulations *to the bulk of his property* in whose hands soever that was to survive him, rather than to its accretion to the wealth of another, when its name and identity would be lost. This would carry it to his wife.

All motives of affection and duty (at the date of this codicil, not less than when he framed his will) would point in the same direction.

VII. The third codicil exhibits the same purpose to keep the bulk of his fortune in his wife as the surviving representative of his name, his wealth, and his social position, rather than break it up, to be lost in the bulk of Daniel's fortune, or hidden in the obscure possession of James.

Had the revocation of the residuary clause of the will been *absolute*, a new feature would have been introduced by opening a possibility, should he survive Mrs. Parish, that the residuum would go to his heirs and next of kin, as undisposed of by will.

The revocation of the residuary clause of the will being dependent upon his wife's surviving him, makes this codicil conform to the plan of the will, and the previous codicils, viz., a preference of the wife's fortune over the brothers—they standing only after her, and before his heirs and next of kin.

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THE RECIPROCAL RELATIONS WHICH SUBSISTED BETWEEN MR. AND MRS. PARISH, AND BETWEEN EACH OF THEM, AND THE FAMILY OF EACH.

I. Relations, sentiments, and conduct of Mr. and Mrs. Parish during their married life.

Susan Maria Delafield was married in October, 1829, at the age of 24 years, to Henry Parish, then 41 years old.

The whole twenty-seven years of their married life were spent in the city of New York, excepting their absence, for travel in Europe, in 1842, 1843, and 1844.

They lived for some years after marriage with Mrs. Delafield, the widowed mother of Mrs. Parish, until their Barclay-street house was built. From that time they lived in Barclay-street, until 1848, when they moved to the house on Union Square, where they resided up to, and at the time of Mr. Parish's death in 1856.

Through the whole of this period Mr. and Mrs. Parish lived, for the summers, with Mrs. Delafield, at her country residence at Hellgate until 1840, when she died, and after that date with Mr. Henry Delafield, Mr. Parish's brother, to whom that property passed.

At the time of the marriage Mr. Parish was a dry-goods merchant, in active business in the city of New York, with Southern connections, and so continued until the year 1838, when he retired from business.

Mr. and Mrs. Parish were never separated for any length of time after their marriage, and lived as comported with his wealth and their position in the society of the city.

The relations between them were always such as belong to the union of husband and wife, and no diversity of taste or temper, nor any accident or influence, ever disturbed the affection or serenity of their daily married life.

II. Mr. Parish's relations to the Delafield family.

Towards Mrs. Delafield his feelings and conduct were those of a son, and towards Mrs. Parish's brothers and sister his

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relations were intimate, cordial, and fraternal. For some years wholly, and for parts of twelve years continuously, he was an inmate of Mrs. Delafield's house, and thereafter, until his death, for four or five months every year he was an inmate of the house of Henry and William Delafield. Dr. Delafield was his physician. John Delafield, the head of the Phoenix Bank, of which Mr. Parish was a leading director, Major Richard Delafield, and Major Jos. Delafield, were his valued friends; and with all the family his intercourse, from his marriage to the end of his life, was habitual, cordial, and unbroken, marked by sincere affection and respect. Mr. Parish seems to have had no business or pecuniary relations of any kind with the members of the Delafield family. They were all independent in character, property, and position, and though he was their superior in wealth, they were never at all dependent on him, or recipients of aid from him. The only favors of a pecuniary nature between them seem to have been the loans to Mr. Parish's house, in the perils of 1837, from the house of Henry and William Delafield. Two brief notes from Mr. Parish, one to Mrs. Payne, and one to William Delafield, illustrate the footing on which he stood towards her relations.

III. Mr. Parish's relations to members of his own family. There seems to have been nothing noticeable in the personal relations and intercourse between Mr. Parish and his several brothers and sisters, and his brother-in-law, *affirmatively*. It appears clear, however, that no habitual or intimate associations existed between him and his brother James, and that they kept up no other intercourse than of casual interviews at long intervals. That with Daniel, his habitual intercourse was wholly as a business partner, though their relations were, in the main, friendly, and of mutual regard in other matters. Their tastes, modes of spending time, usual resorts, brought them rarely in company away from the store, and Daniel's health disinclined him to society. He was very rarely in Henry's house, either in Barclay-street or at Union Square, and his letter of June 10th, 1836, shows that their

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conversations were not always agreeable. With Mr. and Mrs. Sherman he seems to have been cordial, and in the habit of not infrequent intercourse in visits at his own house; and with Miss Ann Parish he held equally, or more intimate relations.

IV. Mrs. Parish's relations to members of his family. Circumstances do not seem to have produced any intercourse, or scarcely acquaintance, between Mrs. Parish and Mr. James Parish or his family. With Miss Ann Parish, Mrs. Sherman, and Mrs. Daniel Parish and her daughters, she seems to have maintained relations of the most frank and cordial character. Her letters, put in evidence by the contestants, bear this impress unmistakably. With Daniel Parish and Mr. Sherman, her relations seem to have been entirely accordant with her husband's.

Relations after the attack.

I. Mr. and Mrs. Parish. Mrs. Parish's whole life was absorbed in constant and affectionate ministry to his needs, mental, moral, and physical, and of complete devotion to his interests, and unbroken obedience to his will. Mr. Parish accepted this affectionate service and devotion as freely as it was offered. Except that his irritability of temper or of manner was sometimes exhibited towards her, he treated her in every way with confidence, respect, and affection.

II. The Delafield family continued precisely the same sentiments and habits in intercourse with Mr. Parish as before the attack. Her brothers Henry and William became inmates of the house to supply the protection which Mr. Parish's disabilities made necessary for himself and his wife. Dr. Delafield remained his physician, and Major Joseph and Major Richard Delafield continued their intimate and attentive friendship.

III. James Parish never visited him nor wrote to him during his affliction. Daniel Parish's few visits are detailed in the testimony; he rejected all share in aid of, or in advice concerning, Mr. Parish's affairs. He sold his lots in Union

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Square, bought in connection with his brother's and with intent to build upon them for his own residence, in the year after the attack, and went to Europe the following year. From a period very soon after the attack, he neither had, nor attempted to have, any intercourse with Mr. or Mrs. Parish, or any of her family, and never went out to the carriage at any of the habitual visits to the store. Mrs. Daniel Parish was a visitor at the house, occasionally, but, before long, dropped all family or formal intercourse. Miss Ann Parish kept up her habits of visiting apparently as before the illness. Mr. Sherman's visits are detailed in the evidence. After they ceased, Mrs. Sherman continued her visits.

IV. Friends and acquaintances. Mr. Kernochan, Mr. Holbrook, Mr. Wiley, and Mr. Gasquet, each of whom had been mercantile partners with Mr. Parish, visited him habitually, and were cordially received, and urged to frequent the house. A numerous body of friends and acquaintances constantly had intercourse with Mr. Parish, and, as a rule, all persons calling were introduced to Mr. Parish's presence. Tradesmen, workmen, and business callers, all had access to him.

Nature and consequences of the apoplectic seizure of July 19th, 1849.

The attack was apoplectic, of moderate violence. Unconsciousness, and the disclosure of hemiplegiac paralysis of the right side, were noticed at the office of Mr. Prime, in Wall-street, where the seizure happened. Within a few days consciousness was undoubted, and intelligent communication with those around him established, and the extent of the paralysis was disclosed. He thenceforward recovered regularly and rapidly, sat up, saw visitors, was conversed with on business, moved about his chamber, the communicating rooms and hall, was carried down stairs, and rode out. In October, a severe disease of the bowels set back the tenor of his recovery, as well as produced, temporarily, its own grave impression on his health. His recovery from this special disease was rapid, after its juncture was passed. He re-

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gained a full measure of general health, and maintained it with casual interruptions from definite diseases of some severity, and died seven years after the attack, at sixty-eight years of age, of a disorder of the lungs. After his October illness he became subject to occasional spasms, from whatever cause; but only once or twice were they followed by any grave sequel. They produced, of themselves, no injury to his general health. He maintained, after the October illness till his fatal sickness, the usual habits as to hours of rising and retiring, as to meals, as to diet, as to daily drives, as to occupation of time, which belong to a person in health. His persistence in all these habits, under the bodily disabilities he suffered, show great nervous energy and vital force. His recovery from various serious and critical illnesses, shows a general vigor of constitution, and healthy action of the organs of life. The special disability he suffered, and its consequences, only enhance the measure of vital powers which triumphed over them. His power of articulation which is exerted through the muscles of the mouth and tongue, was, in great part, paralyzed. The voice which is formed in the larynx, was left. His emunctory sphincters were somewhat implicated—variably, however—and their embarrassment was not regarded as a permanent and constant disorder by his physicians. His power of locomotion improved, and remained uniformly so as to permit his movement freely, with an attendant to steady his postures. His right arm gained a little, perhaps, but not substantially, for a while, but soon became wholly relaxed and useless. His left arm, for general purposes, was free in its movements, and had strength, and was under control. He had no use of it in writing, without painful and irksome effort, and would not long attempt the effort. His successes and failures are detailed in the evidence. He could not use it in picking his teeth, which service needed to be performed by his attendants. This shows his hand and arm not to have been pliable or steady enough for a use much less nice than that of writing. His senses were all entirely good, except that the imperfect condition of his eye-

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sight, developed long before the attack of apoplexy, continued, and he had not infrequent troubles with his eyes. His paralysis did not affect either his senses or sensation. Nervous irritability or excitability manifested itself, but exclusively in connection with mental causes and influences, though with undue and exaggerated expression. For a medical view of the physical condition and bodily health of Mr. Parish, after the attack, in all points having or supposed to have any significance in connection with the condition and operation of his mind, and for general information concerning the nature and effects of the bodily ailments under which he suffered, reference is made to "A medical consideration of the physical condition of Henry Parish, as bearing upon the question of his mental capacity," submitted by the appellants.

STATEMENT OF THE SCOPE OF THE INQUIRY OF FACT, AND OF THE MEANS, INSTRUMENTS, AND SOURCES OF INVESTIGATION, THEIR EXTENT, VARIETY, CERTAINTY, AND COMPLETENESS.

The *scope* of the inquiry, as matter of fact, is, whether the codicils propounded, all or any one of them, form part of the last will of Henry Parish.

This inquiry, without considering, *now*, any narrower limitation which the actual circumstances of the case impose, is confined to three heads:

I. Whether Henry Parish, at the date of the codicils respectively, had TESTAMENTARY CAPACITY, or the power to make *any* will.

II. Whether, having such testamentary capacity, these codicils, respectively, were procured from him by UNDUE INFLUENCE OF OTHERS, whether of *fraud* or *coercion*.

III. Whether, having such testamentary capacity, and undue influence not being proved, he executed those codicils, respectively, as parts of his will—this being the question of the "FACTUM" of the instruments, or their *formality* and *authenticity*.

The *occasion* of the doubt, and, therefore, of the inquiry,

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arises from the state of bodily ailment, infirmity, and disability under which Mr. Parish labored for the last seven years of his life, as the sequel of the apoplectic blow in July, 1849. Upon the means and sources of investigation applicable to this inquiry, the record suggests some general observations:

1. Mr. Parish, during the whole of these seven years, lived at his mansion at the head of Union Square, one of the most public places in the city, in the midst of that range of society in which he and his wife moved, and in which the contestants, and all the beneficiaries named in the will, moved. He was, ostensibly, the master of his house and of his household. He, almost daily, rode for several hours, in the business part of the day, to and through the most frequented parts of the city, stopping at the usual resorts to which his affairs led him before his illness.

2. His household, at all times, included a numerous body of servants, constantly changing at their own pleasure, and having such connections and associations outside of the house as they saw fit. All of these servants, at all times, had free access to Mr. Parish, and ready means of observation or knowledge of whatever occurred in the house. They were never selected, instructed, or secured in any manner whatever, nor attempted so to be, by any person; were never retained in service by any effort, or specially paid or favored in any way, during such service. They came and went, bringing into and carrying out of the house whatever views, feelings, prejudices, intelligence, and opinions might happen to them.

3. All persons who, by any social rule or personal claim, were visitors at the house of Mr. and Mrs. Parish, as friends or acquaintances of either, before the illness, were in like manner welcomed during the period under inquiry, with a few brief exceptions when the severity of particular disease necessitated seclusion. A large and varied list of most respectable and intelligent persons, in the various professions and employments of life, and in different social positions, and upon occasions habitual, frequent, or casual, on motives of relationship, friendship, affection, duty, courtesy, or business,

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were admitted to the house and to the society of Mr. Parish at their own will. In the number were included every member of Mr. Parish's family, every partner, clerk, or business connection of his, who sought admission, and (leaving out of the present view the point as to Daniel Parish or Mr. Sherman) no person is shown to have been denied, or impeded in, access to the house, or intercourse, in the house or out of the house, with Mr. Parish, or observation of his person, his condition, his demeanor. Besides the witnesses examined, the proponent furnished in the evidence, to the contestants, a list of some sixty visitors, and the names of the servants, not called.

4. The professional persons employed either in the preparation or the execution of the testamentary instruments, or in medical attendance upon Mr. Parish, were taken upon the most obvious grounds of worthiness and ability.

Mr. Lord, it is unnecessary to say a word about. He is as well known to this court, and to every court in the State, as to the parties or their counsel. Dr. Delafield, and his partner, Dr. Markoe, as his own physicians, necessarily attended him if his care or cure was the object. Their character and position would have entitled them to such employment had they been strangers. Dr. Francis U. Johnston, among the most eminent physicians of the city, was selected, for that reason, to consult with Dr. Delafield in the urgency of the first attack, and continued till the convalescence. Dr. Bliss was called in, for a special occasion, and Dr. Wilkes and Dr. Dubois, eminent oculists, attended him for his eyes. All these were selected wholly for medical skill and personal character. The documentary witnesses were called upon the most suitable considerations, and outside of any circle of family or dependents. Charles Augustus Davis, a most eminent merchant and prominent member of society; Ephraim Holbrook, a man of wealth, former partner and near neighbor of Mr. Parish; John Ward, the best known and most respected banker in Wall-street; Daniel D. Lord, a lawyer of mature age and experience, partner with his father,

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and attending at his suggestion. These were all the witnesses, these all the observers of Mr. Parish, that were, in any sense, selected or called in. Who else visited, or forebore to visit, acted on their own motion.

5. The proponent, and Mrs. Parish, the beneficiary under the codicils, have neither withheld nor disguised any thing that the real or fancied interest of the contestants required in evidence. Nothing sought has not been found—nothing found has not been produced. The contestants have not foreborne inquiry in any direction or to any extent. No timidity, false modesty, or fantastic courtesy has restrained them. No secrecy of nature or of affection has been respected, and every infirmity of either, that could be discovered, has been displayed. Whatever means tended to their end, their end has seemed to them to justify.

6. The great body of witnesses produced, on one side and the other, and the fulness of their testimony, the great labor and ability bestowed by the contestants' counsel in their examination, and their omission to call any other witnesses from the list of observers furnished them, must satisfy the court that nothing favoring the contestants' views has eluded their notice or escaped their grasp. In such case, the argument of the negative, or of what they have not proved, carries a weighty impression.

7. As there has been no defect of intelligence and honest observation of Mr. Parish in his daily life for seven years, nor any suppression or loss of evidence by fraud or misfortune; as the whole scene has been watched from as many points of view, by as many different and independent intelligences as could seem at all necessary or useful, and as the evidence has, in fact, produced so extensive a survey of the conduct of Mr. Parish and of those about him, of the conduct of persons in every possible relation to him, of the conduct of the witnesses themselves, it would seem that the materials were ample for a satisfactory and reliable judgment, broadly, one way or the other, unless, under the rules of our law, the point of inquiry is so nice, obscure subtle, or un-

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certain, as to elude all this scrutiny into the subject of controversy by witnesses in the first place, and of their evidence through judicial procedure.

STATEMENT OF THE RULES OF LAW GOVERNING THE INQUIRY,
WITH THE AUTHORITIES.

Upon the question of testamentary capacity, our statutes give the rule as to who may and may not make wills. They exclude from this capacity only persons (above a certain age) who are "idiots or of unsound mind." The restriction upon alienation of lands is to the same purport.

"Every male person of the age of eighteen years or upwards, and every female, not being a married woman, of the age of sixteen years or upwards, of sound mind and memory, and no others, may give and bequeath his or her personal estate by will in writing." (2 *Rev. Stat.*, 60, § 21.)

"All persons, except idiots, persons of unsound mind, married women, and infants, may devise their real estate, by a last will and testament duly executed according to the provisions of this title." (*Id.*, 57, § 21.)

"Every person capable of holding lands (except idiots, persons of unsound mind, and infants), seized of, or entitled to, any estate or interest in lands, may alien such estate or interest at his pleasure, with the effect and subject to the restrictions and regulations provided by law." (1 *Id.*, 719, § 10.)

The difference in phrase between the statute of wills of personal estate and the statute of wills of real estate, in defining testamentary capacity, gives rise to no difference in their force in this regard, nor in their judicial construction. The tenor of judicial decisions in this State has been clear and uniform in maintenance of the rule of the statutes.

"Imbecility of mind in a testator will not avoid his last will and testament. Idiots, lunatics, and persons *non compos mentis*, are disabled from disposing of their property by will; but every person not embraced within either of the above classes, of lawful age and not under coverture, is competent

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to make a will, be his understanding ever so weak. Courts, in passing upon the validity of a will, do not measure the extent of the understanding of the testator; if he be not wholly deprived of reason, whether he be wise or unwise, he is the lawful disposer of his property, and his will stands as a reason for his actions."

"A man's capacity may be perfect to dispose of property by will, yet inadequate to the management of other business, as, for instance, to make contracts for the purchase and the sale of property; and therefore a court of Chancery may commit the property of a person incapable of managing his estate to the charge of a committee, and yet, after his death, give effect to a will made by him whilst laboring under such incapacity." (*Stewart v. Lispenard*, 26 Wend., 255.)

Mere imbecility of mind in a testator, however great, will not avoid his will, provided he be not an idiot or a lunatic. The term unsound mind, in the statute concerning wills, is of the same signification as *non compos mentis*; and any one otherwise competent, to whom these terms do not apply, may make a valid will. One has a right, by fair argument or persuasion, to induce another to make a will in his favor. (*Blanchard v. Nestle*, 3 Den., 37.)

"Our law does not distinguish between different degrees of intelligence. It does not deny to a man of very feeble mind the right to make contracts and manage his own affairs. In the absence of fraud, proof of mere imbecility of mind in the grantor, however great it may be, will not avoid his deed. There must be a total want of understanding." (*Osterhout v. Shoemaker*, 3 Den., 37, note.)

"Imbecility of mind, not amounting to lunacy or idiocy, in the grantor of land, is not sufficient to avoid his deed where, in obtaining it, there is no fraud."

The doctrine of *Jackson v. King* (4 Cow., 207), approved and adopted. (*Odell v. Buck*, 21 Wend., 142.)

"Where an act is sought to be avoided on the ground of mental disability, the proof lies with him who alleges it.

"Till the contrary appears, sanity is to be presumed.

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"Idiots and lunatics, or persons *non compos*, are incapable of contracting; and the disability is confined to these.

"One *non compos* is one who has wholly lost his understanding. To affect a deed at the common law, an entire loss of the understanding must be shown. The common law has drawn no line to show what degree of intellect is necessary to uphold it." (*Jackson v. King*, 4 *Cow.*, 207.)

"It is one of the painful circumstances of extreme old age, that it ceases to excite interest, and is apt to be left solitary and neglected. The control which the law still gives to a man over the disposal of his property, is one of the most efficient means which he has, in protracted life, to command the attentions due to his infirmities." (*Van Alst v. Hunter*, 5 *Johns. Ch.*, 148, 160.)

"The law treats the right of testamentary disposition with great tenderness. If questioned, it must be on strong grounds. To overturn this solemn, deliberate act, fraud, circumvention, idiocy, or lunacy must be affirmatively established."

"If we adopt the opinion of Mr. Mann, the most important witness for the contestants, that the decedent was mentally competent to make a will in October, 1851, with suggestion and advice, then, of course, he had testamentary capacity. There being testamentary capacity, the law does not regard its quality or degree, except so far as to see, in cases of low degree, that the testator enjoyed the free use of such capacity as he possessed." (*Thompson v. Quimby*, 2 *Bradf.*, 449, 487.)

The litigation on John Fisher's will shows what, in judicial inquiries, are regarded as doubtful cases, and may receive a determination either way.

Vice-chancellor Sandford sustained the will against impeachment for incapacity and for undue influence. (*Clarke v. Sawyer*, 3 *Sandf. Ch.*, 351.)

The chancellor rejected the will, his opinion showing that his judgment was based upon weakness operated upon by fraud, which is the objection of undue influence. (*Clark v. Fisher*, 1 *Paige*, 171.)

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The Court of Appeals affirmed the decree of the chancellor, "annulling the will of the late John Fisher, deceased, as obtained by fraud and undue influence."

(This decree of the chancellor, thus affirmed, was not that in the case of 1 *Paige*, but the decree made on appeal from Vice-chancellor Sandford's decision in 3 *Sandf. Ch.*)

SHANKLAND, J. (delivering the opinion of the Court of Appeals), says: "Regarding as I do the cases of *Stewart v. Lispenard*, and *Blanchard v. Nestle*, as fixing the standard of testable capacity at any given point above that of the idiot and lunatic, the will cannot be declared void for the want of a sound disposing mind." (*Clarke v. Sawyer*, 2 *N. Y.* [2 *Comst.*], 498.)

See the observations of Senator Verplanck on the speculative question, whether the right of disposing of property after death flows from positive law and the policy of society, or is a part of the natural right of property, agreeing with Lord Mansfield (*Windham v. Chetwynd*, 1 *Burr.*, 414), that "the power of willing naturally follows the right of property." (*Remsen v. Brinckerhoff*, 26 *Wend.*, 333; *Stewart v. Lispenard*, *Id.*, 255, 296-7.)

"A few affirmative facts showing understanding, however humble, must, in such an inquiry, directed to the point of idiocy or total want of reason (not of lunacy, or disturbed or clouded intellect), outweigh very many negative facts. The affirmative facts prove the existence of mind; and when that is once shown, the negative go to show only its defects and weakness, not its entire deprivation. According to the old rule, 'a wise man does not always show reason, a fool never does.'" (Senator Verplanck, in *Stewart v. Lispenard*, 26 *Wend.*, 310.)

"Mere feebleness of intellect, however considerable, in a testator, will not invalidate a will."

"The cases certainly establish the rule that feebleness of intellect, however considerable, in the testator, shall not invalidate a will."

"The reason for sustaining the wills of excessively weak

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persons (and, by those, I mean persons of the lowest degree of mental capacity, where there is a glimmer rather than light), is, that the weak have the same rights with the prudent or strong-minded to dispose of their property, and that if imbecility, and not a total absence, or rather perversion, of mind, should constitute inability to act, it would be impossible to draw any clear line of distinction, or one which would generally prevail. There is much force in these reasons. At any rate, the rule has been thoroughly established and we must submit to it, whatever may be our opinion as to its necessity, propriety, or expediency." (*Newhouse v. Godwin*, 17 Barb., 286, 257-8.)

The dissenting opinion of Mr. Justice Clerke in *Thompson v. Thompson*, is the only judicial criticism (to be found in our reports) in disparagement of the firm rule of our statutes and decisions on the subject of testamentary capacity. A careful perusal, however, of this well-considered opinion, will show that, after all, the learned judge is disposed to rest the legal consequences of imbecility, or unsoundness of mind, falling short of idiocy or lunacy (the case under consideration being one of alleged aberration of mind), more upon its leaving its subject "very much to the mercy of designing persons, and exposed to undue influence," and to approve Senator Verplanck's proposition (in *Stewart v. Lispenard*), that though this condition does not destroy testable capacity, it may, in connection with other evidence, show that the particular testamentary act "was the result of fraud, and of abuse of confidence, perhaps of delusion." (Judge Clerke's opinion [dissenting,] *Thompson v. Thompson*, 21 Barb., 107, 127.)

The rules of our law on the subject of undue influence, in connection with testamentary acts, are—

1. That it must come to the substantial texture of fraud or coercion in the procurement of the testamentary acts questioned, to be recognized in the law as undue influence.
2. That it must be proved by the party contesting the testamentary act on that ground; and the exclusion of any such

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conclusion forms no part of the proponent's proofs or argument.

These propositions have never been brought into question; but a brief citation from two cases, to be more specially referred to in another connection, is given.

"In the absence of any inconsistency between the provisions of a will and the declarations of a testator otherwise expressed, or of any affirmative evidence of fraud or undue influence, the court will not speculate as to the motives of the testator, nor, upon mere suspicion, presume procurement by artifice or undue means."

"It is sufficient, in the absence of proven fraud or undue influence, and where the requisite capacity exists, to stand by the will. If its provisions be grossly unreasonable or absurd, or opposed to the ascertained dispositions and affections of the party, these circumstances, if shown, may be of importance, as they reflect upon the question of capacity; but a person of competent mind 'is the disposer of his own property, and his will stands as a reason for his acts.'" (*Bleecker v. Lynch*, 1 *Bradf.*, 458, 472.)

"Influence, in order to be undue within the meaning of any rule of law which would make it sufficient to vitiate a will, must be an influence either by coercion or by fraud."

"It is, however, extremely difficult to state, in the abstract, what acts will constitute undue influence in questions of this nature. It is sufficient to say that, allowing a fair latitude of construction, they must range themselves under one or the other of these heads—coercion or fraud."

"One point, however, is beyond dispute, and that is, that whenever it has been proved that a will has been executed with due solemnities, by a person of competent understanding, and apparently a free agent, the burden of proving that it was executed under undue influence is in the party who alleges it." (Lord Ch. Cranworth, in *Colclough v. Boyse*, 6 *House of Lords Cases*, 45; *London Jurist*, May, 1857, 373.)

All that relates to the formal authentication of testamentary papers,—all that constitutes the "factum" of a will as a

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valid and effectual legal act—is the subject of statutory regulation, both complete and definite.

“Every last will and testament of real or personal property, or both, shall be executed and attested in the following manner:

“1. It shall be subscribed by the testator at the end of the the will;

“2. Such subscription shall be made by the testator, in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made, to each of the attesting witnesses;

“3. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament;

“4. There shall be at least two attesting witnesses, each of whom shall sign his name as a witness, at the end of the will, at the request of the testator.”

“No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked or altered, otherwise than by some other will in writing, or some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, cancelled, obliterated, or destroyed, &c.” (2 *Rev. Stat.*, 63, §§ 40, 42.)

As no one of these statutory requisites to validity can be dispensed with, so no further requisites of authentication of the instrument propounded as the very will of the testator, can be insisted upon.

The “declaration of the testator to the witnesses that the instrument is his last will and testament, is plenary evidence, by the statute, that it is so known, understood, and intended by him to be. No other evidence to this point can supply the want of this—the want of further evidence can, in no case, disparage the effect of this.” (*Remsen v. Brinkerhoff*, 28 *Wend.*, 345.)

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POSITIONS OF THE PROPONENT, AND OF THE CONTESTANTS DANIEL AND JAMES PARISH, AND THE LIMITS OF THE CONTROVERSY BETWEEN THEM.

First. On the point of testamentary capacity, the proponent contends that Henry Parish, at the time of the execution of each of the codicils in dispute, was neither "an idiot," nor "of unsound mind," but, on the contrary, "of sound mind and memory." That the bodily disorder, disease, and disability of Mr. Parish, at the times in question, did not affect his testamentary capacity, and are, themselves, the sole and the adequate cause of the appearances which are insisted upon in disparagement of his mental capacity.

On this point the contestants, Daniel and James Parish, are understood to contend that Mr. Parish, at the times in question, was "an idiot," incapable of any testamentary act.

Second. On the point of undue influence, or procurement of the codicils in question by fraud or coercion, the proponent contends that such influence not only did not exist and has not been proved, but that no particle of proof has been produced tending to show any such influence.

On this point the contestants, Daniel and James Parish, are not understood to contend that any undue influence was exercised over, or upon, Mr. Parish, and so to contend would be fatal to their proposition that he was an idiot, having no testable capacity. But they contend that the codicils in question proceeded wholly from the will and invention of Mrs. Parish, and that all the apparent or alleged intervention of Mr. Parish in the testamentary acts was that of a mere puppet, set up and moved by her.

Third. On the "*factum*," or execution and authentication of the codicils in question, no controversy is made.

It will be perceived, then, that the contestation of fact, on the part of the contestants, Daniel Parish and James Parish, is reduced to the proposition that, from the date of the apoplectic blow of July, 1849, the testator was in a condition of idiocy, totally incapable of any testamentary act.

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1. This excludes any controversy as to lunacy, insanity, derangement, aberration of mind, hallucinations, or delusions, and their actual or presumable import and influence in the premises. In this we all concur, no facts are brought in evidence tending to show disorder of this nature.

2. It removes the element of uncertainty, misconception, and error, which intervenes in a survey of facts and a comparison of opinions, produced by different observers at different times, of varying moods and fluctuating conditions which belong to the nicer cases of insanity, partial, interrupted, mental, or moral. Here, a continuous, uniform, and well-defined state of mind (or no mind) is in controversy. If he was an idiot when one witness saw him, he was an idiot when each witness saw him.

3. It excludes all claim or argument of undue influence, of which it is the essence that a testable capacity and volition are controlled, in the form of force or fraud, by another's volition.

4. It puts the issue upon a point of observation, capable of determination, if there were observers, other than idiots, to give the means of determination.

Thus Judge Clerke says of the characteristics of idiocy: "It is a congenital obliteration of the chief mental powers, amounting to a great insensibility to external impressions, accompanied by certain physical indications which can never be misinterpreted; indications which proclaim the torpor of the faculties within with as unerring certainty as the rolling eye and staggering gait proclaim the drunkard, or the pallid and hollow cheek the victim of disease." (*Thompson v. Thompson*, 21 Barb., 107, 120.)

The learned judge speaks of "congenital" idiocy, but no distinction as to the *indicia* of the state can be, or was intended to be, taken between congenital or supervening (or acquired) idiocy.

This broad and open proposition, in the face of the overwhelming testimony of the numerous and intelligent observers to whose scrutiny Mr. Parish was subjected, and

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who have sworn to his capacity, would not have been assumed as the necessary basis of his argument against the codicils by the able and sagacious counsel for the contestants, in preference to the twilight region of "feebleness of mind," "lack of spontaneity," "undue influence," "inofficious will," which form the staple of so many reported will cases, unless he was forced to it by the compulsion of his own acute and experienced professional perceptions of what was, and what was not, capable of argument.

1. Thus, if intelligence in the testator were admitted into his argument, and so the testimony left to its natural force, according to its plain sense, the degree of intelligence is manifestly either normal or undistinguishable therefrom by any measure of reduction.

2. The testator, standing as an intelligent agent, to maintain the proposition of "undue influence" upon the evidence, would appal the most intrepid reasoner.

3. To predicate "inofficiousness" of testamentary dispositions in favor of a wife, in such conjugal relations as are shown, in preference to collateral kindred, in such relations as are shown, would be, in terms, absurd.

4. With intelligence, without undue influence, a testament, not inofficious, requires but the formal proofs to establish the "*factum*" to secure its probate. These are incontestable.

In escaping these insurmountable difficulties, the contestants' counsel braves others, some of which may be noticed.

1. If Mr. Parish were an idiot for seven years, and the counsel can satisfy a judicial inquiry of that fact, Mrs. Parish must have known it through the whole period.

2. Instead, therefore, of proving overweening influence over her husband as the fault or fraud of Mrs. Parish, and this, too, in the particular acts only of the making of the codicils, and this, besides, only committed against the contestants, the proof of the idiocy of Mr. Parish includes the proof of the sudden and universal depravity of Mrs. Parish—making every act and motion of her life a falsehood—every

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attitude, and word, and thought, a fraud—and, simultaneously, involving an exaltation and expansion of mental and moral power, by which, at will, as if a sorceress, she beguiles the intelligence and corrupts the integrity of all who come within her spell.

3. By the same necessity the proof must compass the complete overthrow of the whole body of the testimony in the sense in which it was given by the witnesses, to the absolute prostration of their virtue and their reason, and in mere derision of all that is “wisest, discreetest, virtuouslest, best,” in the society in which we all live.

Thus, to prove that the apoplectic blow which afflicted the body of Henry Parish overthrew his mind, the counsel, as his best and most probable theory, undertakes to prove that it crushed the moral nature of his wife, and with unspent force promiscuously dispersed, embraced in its catastrophe all those who stood about them.

This is, indeed, the proof of “*ignotum per ignotius*”—of “*difficile per difficilius*”—of the improbable by the impossible.

The proponent maintains, on these points, These propositions:

FIRST.—Mr. Parish, at the dates of the execution of the several codicils, possessed full testamentary capacity upon any rule or measure that can be claimed.

I. This appears sufficiently from the evidence given by the documentary witnesses to the respective codicils. Their intelligence, character, acquaintance with testator, means of judgment, opportunities of observation, and entire independence, give to their evidence irresistible weight.

II. The witnesses for the contestants, so far from showing deficiency of testamentary capacity, prove its adequacy.

III. The evidence in support of the documentary witnesses is overwhelming in amount, in weight, in intelligence, in character, in independence, in variety, in opportunities of judging, and in the faculties of measuring and scrutinizing the operations of mind.

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SECOND.—The evidence of the execution of the codicils, of careful and deliberate communication to the testator of the contents of each of them, of scrupulous consultation of the wish of the testator, both formally as to the execution of the several papers, and substantially as to their provisions, of full instructions (in respect of the second and third codicils) directly from the testator to the professional draftsman, is complete. To this no conflicting or contrary evidence is offered. The only question can be, therefore, of either the reliability of the witnesses in their testimony, or the reliability of the method by which the wishes of the testator were communicated or ascertained. There is no view in which any tribunal can judge over these witnesses, and against their evidence, instead of by them, and according to their evidence.

THIRD.—The codicils were not obtained by undue influence—i. e., by either coercion or fraud in any form.

I. As to the first codicil, there can be no pretence of influence by habit or system; there is certainly no evidence of actual influence.

II. The second and third codicils were made at periods in the course of the testator's health, when he was at the highest vigor. There is no evidence of influence in respect of either of them.

FOURTH.—The secondary evidence of influence, viz., of a seclusion of the person of the testator, or an exclusion of other probable or natural objects of affection or testamentary care, is wholly wanting in the case. The evidence shows the utmost publicity of life, and unimpeded access to the testator on the part of the contestants. James never sought any intercourse of any kind. Daniel made for himself the only obstacles to a welcome at the house. He had abundant opportunities of intercourse with his brother out of the house, but never availed of any. Exclusion, to be an element in such a case, must be systematic, substantial, and against efforts to gain access. A mere fanciful, sentimental, or conventional exclusion, if any proof of such could be found, is

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too-unsubstantial to be of any weight in the cause. From a voluntary withdrawal from intercourse, the influences are wholly against the contestants.

FIFTH.—Undue influence is not predicable of a testamentary provision in favor of the wife, filling for the whole period of their married life, and more than a quarter of a century, the true conjugal relation, and in preference not over children, not in the disregard of needy relatives, not in disappointment of any expectations authorized or encouraged, but of one brother in independent circumstances, who maintained no acquaintance with him, and of another of abundant wealth.

SIXTH.—The codicils are not inofficious testamentary dispositions, not diversions from any previous testamentary purposes, and not inharmonious with any expressed or proved affections or intentions; but, on the contrary, they are officious, in union with previous testamentary dispositions, conformed to expressed and proved affections and intentions.

OF THE TRUE WEIGHT AND IMPORT OF PHYSIOLOGICAL AND MEDICAL VIEWS BEARING, OR SUPPOSED TO BEAR, UPON THE PROBABILITIES, OR INFERENCES, AS TO THE CONDITION OF MR. PARISH'S MIND, FROM HIS BODILY DISORDERS.

The contestants might, under the rules of evidence governing such cases, have offered medical witnesses, in the character of experts, to speak upon the case presented by the evidence as to the physical condition of Mr. Parish, upon the question of the probable or inferable condition of his mind. As the contestants' views find no support in the "opinions" of the six medical witnesses examined in the case, and who are entitled to speak in the double capacity of observers and of experts, it would seem important to them to have brought this ancillary evidence of experts, if they could find it, or if they esteemed it significant. Their omission to bring the evidence of experts, then, must be put to the account of its not being obtainable, or not being useful. Instead of intro-

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ducing opinions of medical experts as evidence, open to the analysis and reduction of cross-examination, the contestants may adduce such opinions, by way of arguments, exposed to no such analysis or reduction. The proponent presents "A medical consideration of the physical condition of Henry Parish," by an eminent physician and physiologist, as mainly useful and instructive to the court in two ways.

First. To supply such special knowledge concerning the bodily diseases of apoplexy and paralysis, as will show their relation to the nervous and cerebral system, and aid in the discrimination between physical and mental derangement, as the cause and explanation of the significant appearances in Mr. Parish's life and conduct, during the period involved in this controversy.

Second. To exhibit, by proofs drawn from the results of medical experience and science, the fundamental truth, that the diseases of apoplexy and paralysis (and whatever others, if any, are imputed to Mr. Parish), are bodily diseases in cause, seat, character, and treatment; that whether mental derangement or debility attends them or flows from them, is an inquiry original and special to each case under observation, and to be answered by a scrutiny applied to the mind and its manifestations; that this mental scrutiny and investigation are governed by the same rules as if the bodily disorders were not present, save only that the derangement and debility which are accounted for as simply affections of the physical frame are to be as absolutely excepted from the mental phenomena and conclusions as if the forms of disease were fever, or gout, or dyspepsia. In other words, that whether a paralytic's mind is affected, is an inquiry of the same nature, and to be satisfied in the same manner, as the same inquiry in respect of a man in bodily health or in any other bodily sickness. The universal testimony of medical science and medical authorities shows, that the observation and judgment, concerning the integrity or deterioration of the mental faculties in a patient afflicted with the diseases in question, are as much a matter of direct investigation, applied

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to the mind itself, as are the observation and judgment, concerning the integrity or depreciation of any bodily function or part, a matter of direct investigation applied to the function or part. From the mental appearances, just as from the bodily, inferences may be drawn as to the seat and gravity of the cause of the paralysis, but no inference arises against the mental faculties, which are observed in play, from the fact of a paralysis, any more than against the motion of a limb or the exercise of a physical function, when the motion and the exercise are manifest. The appearances, mental or bodily, exhibit the nature and extent of the paralytic affection, and no general reasoning as to what might be expected, can, in the least, contradict or displace the actual appearance.

It follows, necessarily, that all correction or modification of an estimate concerning the state of the intellect of a patient formed upon observations in life, by anatomical or physiological investigation *post mortem*, is rejected by medical as well as by judicial reasons. Mental traits and action observed in life, if they show a rational condition, can never change their character by a *post mortem* exploration of disintegration or degeneration of the brain, any more than the motion of the limb or the function of digestion observed in life, can be displaced by an autopsy of the brain.

So, on the other hand, mental disorder or debility, manifested in life, could never be made mental integrity and vigor by the explorations of anatomy disclosing no adequate cerebral defect, any more than the motion of a limb or the use of a sense, lost in life, would be proved to have been healthful and sound, from no trace appearing of lesion or atrophy of the appropriate nervous or cerebral structure.

The whole method of inductive reason rests upon these principles. The arguments of experts, if any shall be introduced by the contestants, must leave the matter just where they find it; to wit, that no generalizations from the cases of paralysis can show what the state of Mr. Parish's mind was, but that the observations of those who saw him must furnish the means of judgment. That being established, the weight

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and import of the experts' arguments are measured by the intelligence and candor, circumspection and temper, which they disclose. They carry no such weight or import as materials for the formation of judicial determination, as the evidence of observers, nor as the evidence of mere experts having the sanction of an oath and the test of cross-examination.

JAMES T. BRADY and **CHARLES O'CONOR**, *for Contestants James and Daniel Parish.*

Henry Parish, the testator, was a wealthy and respectable New York merchant, of competent education and high intelligence. In September, 1842, he made his will, arranging its details in numerous private consultations with Charles G. Havens, Esq., one of the law firm usually employed by him. He was then aged fifty-four years, and had finally retired from business; his wife was aged thirty-seven. They had been then married thirteen years. There never was any issue of the marriage. His estate was then about \$732,000. His collaterals were his brother, James Parish, then having six children; his brother, Daniel Parish, then having seven children; his sister, Ann Parish, unmarried, and aged fifty-two years, and his sister, Mrs. A. M. Sherman, having one child.

The dispositions of the will are as follows: he gave to his wife \$331,000; to his nephew, Henry Parish, the son of his brother Daniel, \$35,000; to his cousin and namesake, Henry Parish Kernochan, \$20,000; to his namesake, Henry Parish Conrey, of New Orleans, \$5,000; to his two sisters, Miss Nancy Parish, and Mrs. Allen M. Sherman, \$20,000 each; to Mrs. Payne, his wife's aunt, an annuity valued at \$5,000; to each of his five executors, as a personal gift, \$10,000, making a total of \$486,000.

If his estate should prove sufficient, he further gave a legacy of \$10,000 to the seven children of his brother Daniel; to the six children of his brother James; to his cousins, Mrs. Joseph Kernochan and Mrs. Abeel; to his brothers-in-law, Dr. Edward Delafield and Major Richard Delafield; and

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to one sister and three sisters-in-law of his wife, making \$210,000. The total amount of dispositions was \$696,000. The residue he gave equally to his brothers James and Daniel Parish, or the survivor of them, and the issue of the other. He named as executors Daniel Parish, Joseph Kernochan, Joseph Delafield, Henry Delafield, and William Delafield.

On July 19, 1849, at mid-day, while transacting business in Wall-street, the testator was suddenly stricken down by an apoplectic stroke. This produced *hemiplegia* on the right side—a permanent disability. According to our view of the evidence, this seizure affected the brain so seriously that the testator was immediately reduced to a state of idiotic dementia, from which mental condition he never recovered in any degree whatever. He survived the event more than six years. His general bodily health was completely restored, his appetite for food returned in its full vigor, he had the full use of one eye and the perfect use of the left arm and hand; yet he never was able, during all this time, to write, to read, to distinguish one figure or one letter of the alphabet from another, to utter one word, or to give one single reliable indication of intelligence or intention higher in grade than such as are exhibited by animals of the dullest species. Of course, he performed no business or other transactions. During all this time he was in the custody of his wife, by whom the residuary legatees were denied access to him. Every transaction concerning his business or property was conducted without any participation on his own part; and nearly every such transaction was controlled and directed by his wife and her agents. Gradually, and as rapidly as practicable, she transferred his personal estate into her own name; and, at his decease, she claimed nearly the whole of it, on pretence that this continuous succession of transfers to her name constituted so many gifts *inter vivos*. The first codicil dated August 29, 1849, gave to the wife his newly acquired real estate, worth about \$200,000. The second codicil executed September 15, 1853, gave her the same real estate over again, and about \$350,000 worth of stocks, &c. It

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gave also \$50,000 to religious and charitable institutions, and revoked the appointment of the testator's brother Daniel as executor, and it also revoked the \$10,000 bequest to him. The third codicil, dated June 15, 1854, made the wife sole residuary devisee, and revoked the residuary bequest to the brothers.

These codicils were dictated by the wife, drawn on her retainer by *her* counsel, and each was executed by a mark. In fact these marks were all made by the wife's counsel. He placed the pen in the testator's left hand, which was perfectly sound, well, and strong; he then drew that hand to the appropriate places; and there, guiding the movement of the pen himself, he, the counsel, made the marks which are alleged to be the testator's subscriptions. The case might be said to present complete proof of undue influence and of fraud, and of coercion, but that one important and indispensable ingredient of such a case is lacking. The testator was in so low a state of idiocy, that he was incapable of being influenced, deceived, or coerced. The disputed codicils are not his acts.

FIRST POINT. The testator had not capacity to make a testament at any time subsequent to his apoplectic seizure on the 19th of July, 1849.

I. The condition denominated idiocy in the Statute of Wills is not necessarily congenital. It may be produced by reduction of power in the material organ of thought or mind, through natural decay, the gradual operation of disease, or sudden violence. (*Swinburne*, part 2, § 5; *De Witt v. Barley*, 17 N. Y., 350.)

II. It is not necessary to the existence of the state denominated idiocy, that there should be a total absence of perception, memory, or even of reason. Idiocy has never been defined, and never can be; it is a condition which no power of language can adequately describe, although illustrations of its existence may easily be presented. It is a state of mind which may differ from the most perfect mental integrity, only in the degree of power present. Every descrip-

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tion, every illustration, and every instance to be found in the books prove this. (*Dean's Med. Jur.*, 457; *Marquis of Winchester's Case*, 6 *Coke R.*, 23 (a); *Comb's Case*, *Moore*, 759; *Herbert v. Downs*, 1 *Ch. Rep.*, 12, 13; *Greenwood v. Greenwood*, 3 *Curt.*, 336 *Append.* 30; *Ball v. Mannin*, 3 *Bligh, N.S.*, 1; *Marsh v. Tyrrell*, 2 *Hagg.*, 122; *Harwood v. Baker*, 3 *Moore P. C.*, 282, 290; *Jones v. Godrich*, 5 *Id.*, 16, 36; *Den v. Van Cleve*, 2 *Southard (N. J.)*, 589, 661; *Den v. Johnson, Id.*, 454; *Goldis v. Murray*, 6 *Jur.*, 608; *Stule v. Schaeffle*, 16 *Id.*, 909; *Boyes v. Roseborough*, 3 *Jur., N.S.*, 373; *S. O.*, 6 *House of Lords Cases*, 2, 45; *Howard v. Coke*, 7 *B. Munroe*, 655; *Elliott's Will*, 2 *J. J. Marsh.*, 340; *Turner v. Turner*, 1 *Littell*, 101; *Shropshire v. Reno*, 5 *J. J. Marsh.*, 91; *Comstock v. Hadlyme Soc.*, 8 *Conn.*, 254; *Kinne v. Kinne*, 9 *Id.*, 102; *Rambler v. Tryon*, 7 *S. & R.*, 90; *Harrison v. Rowan*, 3 *Wash. C. C.*, 580; *Stevens v. Van Cleve*, 4 *Id.*, 262; *Sloan v. Maxwell*, 2 *Green's Ch. (N. J.)*, 563; *Andress v. Weller*, 2 *Id.*, 604; *Heister v. Lynch*, 1 *Yeates (Penn.)*, 108; *Dornick v. Reichenback*, 10 *S. & R.*, 84; *Tomkins v. Tomkins*, 1 *Bailey (S. C.)*, 92; *Davies v. Calvert*, 5 *Gill & John.*, 269; *Black v. Ellis*, 3 *Hill (S. C.)*, 68; 2 *Evan's Pothier*, 539, *et seq.*; *Clarke v. Fisher*, 1 *Paige*, 171; *Stewart v. Lisperard*, 26 *Wend.*, 290, 291, *Walworth, Ch.*; *McCully v. Barr*, 17 *S. & R.*, 445; *Ford v. Ford*, 7 *Humph.*, 92; *Converse v. Converse*, 21 *Verm.*, 168; *Coleman v. Robertson*, 17 *Ala.*, 84; *Kirkwood v. Gordon*, 7 *Rich. So. Car. Law*, 474.)

1. One who could count five, and no further, would show some understanding, yet he would in law be esteemed an idiot. (*Swinburne*, part 2, § 4; *Den v. Johnson*, 2 *Southard*, 454; *Den v. Van Cleve*, 2 *Id.*, 589, 661.)

2. One who at a testable age should possess all the knowledge and capacity of a child three years old—and this is considerable—would be esteemed an idiot. (*Swinburne*, part 2, § 4; *Shropshire v. Reno*, 5 *J. J. Marsh.*, 91; *Walworth, Ch.*, in 26 *Wend.*, 290, 291; *Howard v. Coke*, 7 *B. Mun.*, 655.)

3. The *Cretins* of the Alps are called idiots in the works which treat of them. They perform all the functions of ani-

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mal life, perpetuate their species, reason well enough to a certain extent, and can perform successfully a limited amount of mechanical labor, and that of a kind requiring some ingenuity.

III. The opinion of Senator Verplanck, in the case of Alice Lispenard's Will (26 *Wend.*, 296), is sometimes referred to as determining that testamentary capacity exists, if there be any mind. This leaves it to be ascertained whether there be any mind; and this, of course, involves the inquiry, what is mind? Consequently the opinion concludes nothing, and leaves the law as it stood before.

The opinion of a single senator in that court cannot always be deemed an authoritative exposition of the law, even though no other be delivered, and though judgment be according to its conclusion. It was really the decision of a question of fact and not of law.

IV. The *onus probandi* that the testator was possessed of sufficient mental capacity, is on the party propounding an alleged testamentary paper. If, after all the evidence is in and due consideration is had, the mind of the court is *in equilibrio*, the paper must be rejected. (*Barry v. Butlin*, 1 *Curteis*, 637; 2 *Moore's Privy Council Cases*, 480; *Broming v. Budd*, 6 *Id.*, 430; *Panton v. Williams*, 2 *Curt.*, 530; 2 *Notes of Cases Supplemental*, 21, 29; *Baker v. Batt*, 2 *Moore P. C.*, 317; *Crowninshield v. Crowninshield*, 2 *Gray*, 527; *Comstock v. Hadlyme, Soc.* 8 *Conn.*, 254; *Gerrish v. Nason*, 22 *Maine*, 438; *Cilley v. Cilley*, 34 *Id.*, 162; *Wallis v. Hodgson*, 2 *Atk.*, 56; 1 *Powell on Devises*, Jarman's ed., 81.)

SECOND POINT. If it could be presumed that the testator had testamentary capacity at the times when the marks alleged to be his own were affixed to the codicils, the evidence would exhibit all the features of undue influence, fraud, and coercion to be found in that unfortunately familiar class of cases.

I. The professional gentleman who drew the instrument, being the agent of Mrs. Parish, and all his little intercourse with the testator being in her presence, and under her super-

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vision, the maxim *qui se scripsit heredem*, applies. (*Paske v. Ollett*, 2 *Phill.*, 324; *Middletown v. Forbes*, cited in 1 *Hagg.*, 395; *Ingram v. Wyatt*, 1 *Hagg.*, 384; *Baker v. Batt*, 1 *Curt.*, 155; 2 *Moore P. C.*, 317; *Butlin v. Barry*, 1 *Curt.*, 614; *Durnell v. Corfield*, 1 *Robert. Eccle. Rep.*, 51; *Durling v. Loveland*, 2 *Curt.*, 225; *Croft v. Day*, 1 *Id.*, 782; *S. C.*, *sub nom. Dufaur v. Croft*, 3 *Moore P. C.*, 136; *Mitchell v. Thomas*, 10 *Jur.*, 461; 12 *Id.*, 967; 6 *Moore P. C.*, 137; *Raworth v. Marriott*, 1 *M. & K.*, 643; *Jones v. Godrich*, 5 *Moore P. C.*, 16; *Mynn v. Robinson*, 2 *Hagg.*, 179; *Crispell v. Dubois*, 4 *Barb.*, 393.)

II. All persons but her own friends being excluded, and the testator being completely subject to the will and pleasure of Mrs. Parish for the gratification of his only known desires, *i. e.*, food and drink, he must be regarded as not having been a free agent. (*Swinburne*, 998, part 7, § 18; *Blewett v. Blewett*, 4 *Hagg.*, 410; *Marsh v. Tyrrell*, 2 *Id.*, 84.)

III. There is a total absence of proof that, in reference to these codicils, there existed spontaneity or even volition. The testator merely yielded to irresistible importunity or force. (1 *Fonblanque's Equity*, 6, Am. ed., 1807; 8 *Viner's Ab.*, 167, tit. *Devise*, Z, 2 pl. 7, A. D. 1791; *Swinburne on Wills*, part 2, § 25; *Green v. Skipworth*, 1 *Phill.*, 53; *Billinghurst v. Vickers*, *Id.*, 187; *Harwood v. Baker*, 3 *Moore P. C.*, 282; *Lamkin v. Babb*, 1 *Swinburne on Wills*, § 1; *Id.*, part 7, § 4; *Hacker v. Newborn*, *Styles*, 427; *Mountain v. Bennett*, 1 *Cox*, 353, 355.)

IV. In the alleged gifts *inter vivos* and the repetitions of the testamentary grants obtained, we may discern that duplicity in title-making which frequently characterizes this description of fraud. (*Vreeland v. McClelland*, 1 *Bradf.*, 393, 431; *Middletown v. Forbes*, cited in 1 *Hagg.*, 395; *Welles v. Middletown*, 1 *Cox*, 112; 4 *Bro. P. C.*, Toml. ed., 245; *Bennett v. Wade*, 2 *Atk.*, 324.)

Counsel for the contestants presented, also, certain references to authorities, arranged under the following three heads:

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I. The conscience of the court is to be satisfied that the paper in question was the act of a free and capable testator. The amount of proof required will, of course, vary according to the circumstances of each particular case; but the rule is invariable. (*Baker v. Batt*, 2 *Moore P. C.*, 317.)

The same rule was declared and ably vindicated, by the Supreme Court of Massachusetts, in *Crowninshield v. Crowninshield* (2 *Gray*, 526). It was there held, that the burden of proving the sanity of a testator is upon him who offers the will for probate, and does not shift upon evidence of his sanity being given by the subscribing witnesses. This case, at p. 530, overrules what is said in *Brooks v. Barrett* (7 *Pick.*, 99).

In *Gerrish v. Nason* (22 *Maine*, 438), WHITMAN, C. J., says: "The presumption that the person making a will was at the time sane, is not the same as in the case of the making of other instruments; but the sanity must be proved." In *Cilley v. Cilley* (34 *Maine*, 162), RICE, J., said "that the burden is upon the appellant to show that the testator was not of sound mind at the time the instrument was executed, if he would set it aside as invalid for that cause."

In *Wallis v. Hodgson* (2 *Atk.*, 56), LORD HARDWICKE said: "It had been determined over and over in this court, that you must show the person to be of sound and disposing mind, when a will is to be established as to real estate, and especially if there are infants in the case; proving it to be well executed, according to the statute of frauds and perjuries, is not sufficient." (*Powell on Devises*, Jarm. ed., 81.)

The rule as to the *onus* may be illustrated by other cases. In *Powers v. Russell* (13 *Pick.*, 69), it was held, that where the proof on both sides applies to one and the same issue or proposition of fact, the party whose case requires the establishment of such fact, has all along the burden of proof, although the weight in either scale may at times preponderate. But where he gives *prima-facie* evidence of such fact, and the adverse party, instead of producing proof to negative the same fact, proposes to show another and distinct propo-

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sition which avoids the effect of it, there the burden of proof shifts and rests upon the party proposing to show the latter fact.

In *Tourtellot v. Rosebrook* (11 *Met.*, 460), in an action to recover damages caused by a fire communicated to the plaintiff's land from a coal-pit which the defendant lawfully set on fire upon his own land, it was held that the burden of proving the defendant's negligence was upon the plaintiff, and *prima-facie* proof of the defendant's negligence does not throw upon him the burden of disproving it.

In *Delano v. Bartlett* (6 *Cush.*, 364), it was held, that where a want of consideration is relied on in defence to an action on a promissory note; and evidence is given on the one side in the affirmative, and on the other in the negative, of the fact of consideration; the burden of proof is on the plaintiff to satisfy the jury, upon the whole evidence of that fact. (S. P., *Sperry v. Wilcox*, 1 *Met.*, 267.)

There are *dicta*, and some decisions in this country, which declare a different doctrine as to the burden of proof from that asserted in the authorities above cited. But there is no opposing decision in which the question has been deliberately examined in the light of the decisions cited above. There are also occasional *dicta* in the ecclesiastical courts, which have sometimes been supposed to be inconsistent with the rule above stated; but, properly understood, those *dicta* do not conflict with the cases cited. The rule stated above was acted on in *Newhouse v. Godwin* (17 *Barb.*, 236).

II. Competency to execute a testament does not exist unless the alleged testator had reason and understanding sufficient to comprehend such an act.

Opposed to the long line of authorities cited under our first point (*ante*, 38, 39) which establish this rule, is the opinion of Senator Verplanck in *Stewart v. Lispenard* (28 *Wend.*, 255).

It is remarkable that the learned senator cites not a single authority relating to testamentary capacity, which supports the standard adopted by him. A large portion of the *dicta*

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cited and relied upon by him, relate to an entirely different matter, viz., the prerogative of the crown to take into its custody the persons and estates of idiots and lunatics. This prerogative, being in its nature odious, and liable to abuse, was always viewed with jealousy, and strictly construed. Decisions or opinions in such cases are not authoritative on the subject of testamentary capacity. Indeed this distinction is expressly taken by *Swinburne* (part 2, § 4). One of the head-notes to *Stewart v. Lispenard* contains the following sentence: "Courts, in passing upon the validity of a will, do not measure the extent of the understanding of the testator; if he be not wholly deprived of reason, whether he be wise or unwise, he is the lawful disposer of his property, and his will stands as a reason for his actions." This is taken substantially from *Shelford on Lunacy*. It is there said (2 ed., 39): "A person's being of weak understanding, is not of itself any objection in law to his disposing of his estates. Courts will not measure the extent of people's understandings or capacities; if a man, therefore, be legally *compos mentis*, be he wise or unwise, he is the disposer of his own property, and his will stands as a reason for his actions; and there is no such thing as an equitable incapacity where there is a legal capacity." The only authorities cited by Shelford in support of this paragraph, are *Osmond v. Fitzroy* (3 P. Wms., 129), and *Willis v. Jernegan* (2 Atk., 251). In fact, however, the paragraph is copied verbatim from a note by Mr. Powell to *Swinburne on Wills* (vol. 1, p. 127). That note is as follows: "A person's being of a weak understanding is not of itself any objection in law to his disposing of his estates. Courts will not measure the size of people's understandings or capacities; if a man, therefore, be legally *compos mentis*, be he wise or unwise, he is the disposer of his own property, and his will stands as a reason for his actions. Neither courts of law or equity examine into the wisdom or prudence of men in disposing of their estates; there is no such thing as an equitable incapacity when there is a legal capacity."

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Powell's authority for his note is *Osmond v. Fitzroy* (3 P. Wms., 129). That case arose upon a bond. The Duke and Duchess of Cleveland intrusted the Lord Southampton, their eldest son (then an infant) to the care of the plaintiff, to attend him in his travels. Lord Southampton, when twenty-seven years of age, was prevailed on by the plaintiff (being still in the service) to give him a bond for £1,000, which was prepared by the plaintiff, and kept secret from the parents. The book says: "There were also some proofs of the weak capacity of the young lord, and that at that time he was unable to raise money to pay off the bond." It was held that equity would set aside the bond as obtained by fraud and breach of trust. But Sir Joseph Jekyll, in delivering his judgment, said: "When a weak man gives a bond, if there be no fraud or breach of trust in the obtaining it, equity will not set aside the bond only (*i. e.*, merely) for the weakness of the obligor, if he be *compos mentis*; neither will this court measure the size of people's understandings or capacities, there being no such thing as an equitable incapacity, where there is a legal capacity." This, therefore, merely accounts to saying that the standard of capacity is the same in equity as at law, which no one disputes. The learned Sir Joseph Jekyll does not attempt to define what the standard of capacity is either at law or in equity; much less does he say that there must be a total deprivation of reason to constitute incapacity. There would seem to have been no pretence in this case that Lord Southampton was so imbecile as to be absolutely incapable of contracting. It is observable that the words, "If he be not wholly deprived of reason," in the head-note to *Stewart v. Lispenard*, above cited, are not found either in Powell's note, or in the case upon which he relies, or in Shelford. In all those books the words are, "if he be legally *compos mentis*." So in *Bath & Montague's Case* (3 Ch. Cas., 107), HOLL, C. J., said: "Be a man wise or unwise, if he be legally *compos mentis*, he is the disposer of his own property."

The case of *Clarke v. Sawyer* (2 N. Y. [2 Comst.], 498),

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left this question untouched. The reporter expressly states that a majority of the court did not pass "upon the question as to the degree of mental capacity necessary to make a will." CLERKE, J., in *Thompson v. Thompson* (21 Barb., 116), shows clearly that the opinion of Senator Verplanck is not a binding authority.

If Mr. Verplanck's opinion could be thought to contain an authoritative enunciation of the law, it is so grossly and mischievously erroneous that it ought to be departed from. It may thus be stated: If mind exist at all, and it be not disordered in its scarcely perceptible manifestations, the individual thus gifted has testable capacity. This is not yet an axiom, nor a landmark of property.

In *Blanchard v. Nestle* (3 Den., 37), the then recently promulgated opinion of Senator Verplanck was given to the jury, and the court in banc, per JEWETT, J., concurred. At the same term the court, in *Osterhout v. Shoemaker* (3 Den., 37, note), laid down the same doctrine as to a deed. These judgments are rather instances of obedience to what may have been mistakenly considered paramount authority, of a recent date, than acts of concurrence by judicial persons.

Some additional light, beyond the report of Mr. Wendell, touching this celebrated case, may be found in the *New York Courier and Enquirer*, of April 7, 1842, where an opinion by the Hon. Henry A. Livingston, one of the senators who voted with the majority, is reported.*

* COL. HENRY A. LIVINGSTON'S OPINION. *In the Court for the Correction of Errors. In the case of the will of Alice Liepenard.*—The frequent applications to break the validity of wills, and endeavors to set aside the intention and wish of testators, have almost become a matter of business, and promise to continue such while the process appears so easy to accomplish the desired end. And at the instance of any or all the remote relatives of a deceased testator, leaving an estate, if a glimmering of hope to obtain a portion of the property takes possession of the avaricious heart, every testament must be brought to the scaffold, and the fatal axe must be applied to strike it out of existence. But it has now almost become time to look around and begin to think, that one of these days some distant descendant of some old family will rush to this tribunal, and with powerful, overwhelming counsel at his

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What was said in 3 *Denio*, 87, with the "faint praise" of Judge Strong in 17 *Barb.*, 357, is believed to constitute all that can be found in the New York Reports favoring Mr. Verplanck's doctrine. In *Jackson v. King* (4 *Cow.*, 207),

command, break down our own wills, and swear we were insane or *non compos mentis*, not knowing what we were about, because we did not leave them the property they covet, and thus scatter the earnings of a long life of industry to the four winds of heaven. Well may we say "We toil for heirs, we know not who, and straight are seen no more." One of the prominent advantages that this court is supposed to possess, is the final termination of litigation; but I hear counsel expressing the determination not to stop here, but jurors are to be impanelled, and facts investigated, all of which I should have thought might better have been done before we ever had any thing to do with it. This case presents many very interesting facts, and shows upon how slight a point and slender a thread hangs the difference between capacity and inability to make a will; the testimony is lengthy and voluminous, all classes of individuals have been examined, from the humble colored washerwoman to the scientific doctor and the learned divine: each in their turn have told what they knew of the capacity and understanding of Alice Lispenard, and from the first dawn of her childhood to the last moment she drew the breath of life, and the cold clod had covered her remains, every moment has come under the stern scrutiny of the retentive memories of these various witnesses. I shall not pretend to follow through the long volumes of this case, but a few of the questions and answers propounded in this book of the proceedings may not be improper to advert to.

In page 123, the question is asked Mrs. Sarah A. Stewart, "What did she say of the other persons you have named?" She answered, "Alice would often say she did not think they cared any thing for her, whether she were dead or alive, and that they should not have a cent of her money; my brother should have it all, that he had been a good friend to her." In page 75, the question is asked the Rev. Duncan Dunbar, "Do you recollect seeing Alice upon your return from Europe? If so, relate the circumstances." Answer. "I returned from Europe about the 9th or 10th of November last. A few days afterwards I called at Mr. Stewart's to inquire for the family. I was shown into the parlor where Miss Alice was sitting alone. As soon as I spoke she recognized my voice. She rose up and cordially embraced me with a shake of my hand, and congratulated me on my return. She asked particularly if my health was benefited by the voyage, I having went to Europe on account of my health. She also asked how Mrs. Dunbar stood the sea, and if she was well since her return. She expressed regret that the ladies of the family had gone out to ride, and that they would be much disappointed at not seeing me." Again the question is asked the same reverend gentleman, "Did her whole manner exhibit strong feelings of friendship?" Answer. "Yes, so much so that I informed my family on my return home

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there is indeed some pretty loose language. But whatever it may mean, it is not authoritative on this question. The same observations apply to *Odell v. Buck* (21 Wend., 143), where congenital idiocy or incapacity was the imputation,

that day, that none of our friends had expressed greater cordiality and affection, and kind satisfaction on the return of myself and Mrs. Dunbar to the city."

In page 134, Mrs. Charles Stewart is asked: "From your knowledge and acquaintance of your aunt, have you any doubt of her capacity to make a will, and have you ever heard her converse upon that subject?" She answers: "I think she was perfectly competent; the conversation to which Mr. Webb alluded to in his examination, passed in my presence, I mean the Roosevelt property; after he left, she spoke of it to me, his having asked her to give her share to him—said she, he shall not have it, that her brother, meaning Mr. Stewart, should have whatever she had." In page 235, Mrs. Murden is asked: "Did you make any remarks respecting the visits of the two Miss Lispenards?" To which Mrs. Murden answers: "She did not; but I made a remark to her, and told her that her nieces had called to see her; she said, they do not care any thing about me, they only hope when I die to get some of my property; but that none of them should have any thing but her brother and sister Stewart. I have often heard her make the same remark, and say they had been so kind to her." In page 146, Mrs. Van Dalsen is questioned: "Did she appear to take any interest in your own family?" Her answer is, after stating several circumstances: "I called at the house one day; Alice said, 'You have got another daughter, Mrs. Van Dalsen.' I said, 'Yes, Miss Alice, I intend to name her after you.' She said, 'You need not name your brat after me, expecting to get something, for I shall not give her any thing.'" Thus, in my opinion, by this answer, plainly intimating that she was conscious of possessing property, and intended to give it to whom she pleased.

In page 19, the Rev. Charles S. Stewart, the question is asked him: "From your knowledge and observation of Alice, have you any doubt of her capacity to make a will, and disposing of such property as she possessed?" To which he answers: "No; I have none. I believe she possessed the ordinary characteristics of mind, and was habituated in their right exercise. The belief has been induced by the constant opportunities I had of knowing that she was correct in her observations of all the ordinary circumstances and events passing around her, and the inferences she drew from them appeared to be correct. She had a good memory, and in other respects she showed she had the common traits of mind; and I believe that her will was made under the influence of the same principles and affections that give rise to the wills of other persons; that it was founded in gratitude and affection to the persons named in it; that she has more than once to myself expressed the warmest affections for Mr. Stewart, and his daughter, Mrs. Stewart, formerly Mrs.

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and *Jackson v. King* is referred to. The only case out of New York in which *Stewart v. Lispenard* appears to have been cited with approbation or followed, is *Potts v. House* (6 Geo., 324). But the Georgia court soon receded from that position. (See *Terry v. Buffington*, 11 Id., 337, 344.)

Skillman, independent of the fact that such affection was evident from her ordinary deportment, and under the circumstances of her life in connection with these two persons. I fully believe that her will would have been the same had she been possessed of the finest mind and the highest cultivation." The question is again asked: "Did you observe any alteration in her capacity or information during the last seven or eight years of her life?" The answer is: "I have previously stated that there was a change in my opinion concerning the character of her mind, which arose from my intercourse with her, and my increased opportunities of judging. I believe there was of late years a development of mind, and an increased exercise of intellect, from the treatment and management she received in the family of Mr. Stewart, and the correction of some habits to which I know she had been addicted from my own observations, and which I believe militated against the right exercise of mind."

From all I am able to gather from this case, and I have attentively listened to the argument of counsel, I am led to the conclusion and belief, that Alice Lispenard was a person of very moderate intellect, but not an idiot; and that she had the power to know and appreciate her friends. Thus we see, that when, as it were, abandoned by her nearest blood-relations, and humbly boarding under the roof of poverty, with strangers, she was indeed a poor, forlorn being, and the demon of intemperance had a powerful dominion over her, and the little faint rushlight of understanding was almost obliterated, and the descendant of the high-minded Lispenard became a common carrier of wood, and a drawer of water to those very persons who had been the servants at the old lordly mansion on the hill. But when she was removed by the kindness and friendship of her brother-in-law, Mr. Stewart, and raised to the dignity of an inmate in his family, and seated at his table, enjoying the benevolent smile of a good Samaritan, you hear no more of her choking at table, with coarse beef; but by degrees she becomes enabled to attend to the little avocations of the family, and feels that there was some blood still circulating in her veins, that tells her she was not that abject outcast they would fain make people believe. By degrees she becomes more temperate, until finally she is entirely so; then the clouded faculties, few and small, however, I admit, but still she belonged to the human family; and I never can consent to place an extinguisher on the faint, glimmering light of her understanding, and put it out forever, but will allow that little spark to shed an humble lustre upon the last act of her life, which was to make a just will, and give what she had to those she loved, and those who cherished her.

I am, therefore, of opinion that the proceedings in this case be reversed.

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The standard of testable capacity may be illustrated by the case of infants. In the civil and canon law, as administered by the English ecclesiastical courts, boys under fourteen years of age, and girls under twelve, are held to be absolutely incapable of making a will. And this rule seems to have been established upon the single ground that the average of children under these ages have not sufficient judgment and discretion to make a will. If, therefore, the court can be satisfied that the decedent possesses less capacity than an ordinarily gifted boy of fourteen, this would seem to be conclusive against his capacity to make a will. The true standard may also be illustrated by cases of lunacy. It is now conclusively settled in England, that the least particle of lunacy (*i. e.* delusion) upon any subject, if firmly seated, renders the subject absolutely intestable. This was settled by the unanimous judgment of the Judicial Committee of the Privy Council in *Waring v. Waring* (6 *Moore P. C.*, 341). And see the late case of *Dyce Sombre v. Troup* (1 *Deane*, 113, 114). The law being thus strict on the subject of lunacy or mental irregularity, it would seem absurd to adopt Senator Verplanck's standard on the subject of idiocy or pure feebleness and lack of power. (See Dr. Rush's Treatise on "The Diseases of the Mind," published 1812, in the 13th chapter, which treats of "Fatuity, or Idiotism.")

III. Where testable capacity is doubtful, or, being established, is of a very low grade, the paper propounded as a testament will be rejected, unless the evidence fully establishes the fairness of the transaction, and shows satisfactorily that the decedent really exercised a free and unrestrained volition. (*Cockcraft v. Rawles*, 4 *Notes of Cases*, 237; *Swinburne*, part 2, § 25; *Green v. Skipworth*, 1 *Phill.*, 53; *Middleton v. Forbes*, 1 *Hagg.*, 395; *Jones v. Godrich*, 5 *Moore P. C.*, 9; *Montefiore v. Montefiore*, 2 *Addams*, 354; *Brouncker v. Brouncker*, 2 *Phill.*, 57; *Mynn v. Robinson*, 2 *Hagg.*, 179; *Evans v. Knight*, 1 *Addams*, 237; *Harwood v. Baker*, 3 *Moore P. C.*, 282; *Mountain v. Bennett*, 1 *Coz*, 353; *Marsh v. Tyrrell*, 2 *Hagg.*, 84.)

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JOHN W. EDMONDS, for *Anne Parish and Martha Sherman, Contestants.*

Henry Parish died March 2d, 1856, leaving a widow, Susau M. Parish, two brothers, Daniel and James Parish, and two sisters, Anne Parish and Martha Sherman. He left no children. On the 20th of September, 1842, he made a will. In July, 1849, he was stricken with paralysis, and remained speechless for the rest of his life, except the occasional utterance of one or two words. His right side was paralyzed. The muscles of his face soon recovered from the attack, the right leg partially recovered, but the right arm remained affected until his death. And for the residue of his life, viz., from July, 1849, to March, 1856, for a period of about seven years, he communicated thought only by gesticulation, by his countenance, and by sounds indicating yes and no, or assent and dissent. During that period he executed three codicils to his will:

One on the 29th August, 1849 (which was re-executed on the 17th December, 1849); one on the 15th September, 1853; and one on the 15th June, 1854. The chief effect of these codicils was to change the disposition of his estate from his brothers to his wife.

By the will he gave his brother Daniel a specific legacy of \$10,000, as an executor, and gave the residuum of his estate, which he valued at about \$40,000, to his two brothers. By his codicils, besides specific devises to his wife, he gave her the residuum, revoking the specific bequest of \$10,000 to Daniel and the devise of the residuum to the two brothers.

By his will he made thirty-three specific devises, or bequests (besides the residuum). By his codicils he revoked none of those, except the \$10,000 to his brother Daniel, but he added four bequests to charitable uses, amounting to \$50,000. By his will (in September, 1842), he gave to his wife real and personal property estimated by him to be worth \$331,000.

By his first codicil (in August, 1849), having in the mean time sold his dwelling and furniture in Barclay-street, which

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he had valued at \$28,000, he devised to his wife his new dwelling, valued at \$110,000
 The furniture in which had by that time come to be worth 50,000
 And a store in Wall-street, which he had bought in 1847, and was valued at 70,000
 Making a total, by that codicil, of . . . \$230,000

By the second codicil (in September, 1853), he confirmed the devises in the first, and, in addition, gave to his wife, in personal property, at par value \$349,460
 And made four charitable gifts for 50,000
 Making a total by that codicil \$399,460

By the third codicil (in June, 1854), he devised the whole residue of his estate to his wife, which residue, at the time of his death, was worth \$221,454

This residuum is arrived at in the following manner:

At his death his whole estate was:

In hands of special administrator \$452,950
 Invested in Mrs. P.'s name 619,964
 Real estate, viz.:
 In the will, after deducting Barclay-street property \$163,000
 In the first codicil 230,000
 893,000

Total of his estate \$1,465,914

Specific legacies were by the will \$690,000

Deducting lapsed and revoked

legacies 75,000
 615,000

By the first codicil 230,000

By the second codicil 399,460
 \$1,244,460

Leaving for the residuum \$221,454

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Besides the increase in value of the property above its par (which was very considerable), and the chance of falling in of specific legacies which, under the twelfth clause of the will, did not vest in the legatees until they attained twenty-one years of age.

Thus, under the will—

The wife would have received	\$331,000
The specific legacies (deducting for those lapsed by death)	424,000
The brothers would have got the residuum at	710,914
Making the total of	<u>\$1,465,914</u>

Under the codicils—

The specific legacies would have been as above.	\$424,000
The specific legacies for charities	50,000
The wife would have got the residuum at (besides the chances of increase before mentioned)	<u>991,914</u>

Making the total \$1,465,914

In the latter event, the brothers would not have received any thing. But, in any event, the brothers' children would have received \$180,000 (deducting only lapsed legacies). And the sisters would have received only \$40,000, and their children nothing, in any event.

CHANGES OF CONDITION.

1. About fourteen years elapsed between the making of his will and his death, and during seven years of that period he was speechless.

2. When, in September, 1842, he made his will, he made an inventory of his estate, and estimated its total value at \$732,000. When he died in 1856, his estate had increased, as before mentioned, to the sum of \$1,465,914, having in that time increased more than double.

3. His dwelling in Barclay-street, valued at \$18,000, and his house in Chambers-street, valued at \$5,000, had been sold, and his furniture, valued at \$10,000, had been mostly sold.

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4. He had bought other real estate, viz., his dwelling on Union Square, at a cost of \$111,260; a building on Wall-street, at a cost of \$76,000; and had furnished his house, at a cost of \$50,000.

5. He had originally 117 shares of Manhattan Gas Co. stock, at the par value of \$50 a share (and worth \$60), \$5,850. When he died, he had 468 shares at par value, \$23,400.

6. He had improved his real estate in New Orleans, thus: House and lot on Camp-street, valued, when he made his will, at \$3,000; was built on, at an expense of \$6,985 42; in 1845 was valued at \$9,000. And the two lots on St. Joseph-street, valued at, when he made his will, \$3,000; were built on, at an expense of \$10,786 50; in 1845, valued at \$17,000.

7. In September, 1842, he had, in bonds and mortgages, \$13,000. In 1856, he had thus invested, \$220,450. Of the mortgages on hand in 1842, none were in existence in 1856, and only \$3,021 in 1848. Of those on hand in 1856, none were held by him in 1842.

8. In 1842, his interest in firms was \$472,379. In 1856, \$6,000.

9. *New Orleans property.* He sold one of the three lots on St. Joseph-street. On the other lots a fire occurred, two or three years prior to his death, which destroyed \$30,000 of their value, but which he received in insurance, thus converting into personalty, and spending that which was specifically devised as realty.

10. *Gifts.* He gave away—taking thus from under the operation of his will, and virtually revoking it *pro tanto*—\$9,978 51; which is exclusive of gifts to devisees under his will, \$91,731 37. And, in addition, is the gift to Mrs. Parish of the stocks and securities invested in her name, \$369,212 35. Making a total of gifts, \$470,923 23. Whether such gifts be valid or not, they show an intention by testator to take that amount away from the will, and an intention to dispose of it otherwise than by his will.

11. *His father's estate.* In the statement of 1842, there is

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no mention of his father's estate. But it appears that in March, 1842, he received a legacy of \$30,000 from that estate, and that seems to have been all he expected from that source. But from May, 1845, to March, 1851, he received in addition from that estate, \$23,351 17. In the balance-sheet for 1849, he enters the receipts from his father's estate at \$47,048 77; after which, he received \$5,830, or a total of \$52,878 77, of which no mention is made in 1842.

12. *Stocks and public bonds.* The change of condition in these assets was as follows: The stock, &c., held in September, 1842, was \$61,500; in March, 1856, \$797,797. The amount held in September, 1842, which he did not hold, or was valueless when he died, was \$32,420; or more than half the whole amount. The increase in the kind of stocks he then held, by rise in value, or further purchases, was \$242,414; or four times as much as all he then held.

13. *General change of property.* Of all the specific property which the testator had in 1842, when he made his will, amounting in the aggregate to \$732,879, he had when he died, in 1856, only \$308,970; thus changing \$423,909 of his original estate.

His real estate diminished in value to the amount of \$38,000. He invested \$210,000 in the purchase of real estate. And \$30,000 of his real estate was destroyed by the fire in New Orleans; in which three items alone there was a change to the amount of \$278,000.

In bonds and mortgages there was a change from \$13,000 to \$220,450.

In stocks, &c., there was a change from \$61,500 to \$797,797.

In his father's estate there was a change from \$30,000 to \$52,878 77.

In his interest in the firms there was a change from \$472,379 to \$6,000.

By gifts he made a change to the amount of \$470,923 23.

And the bulk of his estate changed from \$732,100 to \$1,465,914.

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14. *The condition of his legatees changed.* Mrs. Payne's life-estate in the Chambers-street property was revoked by his sale of the property; and her annuity, valued by him at \$5,000, lapsed by her death. The following legatees died during the lifetime of the testator, to each of whom was devised \$10,000: Jane Ann, Elizabeth, Mary Louisa, Henrietta, daughters of James Parish; Mrs. Kernochan, Emma Delafield, William Delafield; thus lapsing legacies to the amount of \$75,000. His brother Daniel had one child born after September, 1842, and his sister Martha had two children after that time, and only one before.

15. *His relations with his family.* The testator was on good terms with his two sisters, but not with his brothers; and the alienation between them occurred after his will was made in September, 1842, and continued until his death. He was on good terms with his wife and all her relations, especially her brothers and sisters, without an exception. His brother Daniel was a man of large wealth. And his brother James was worth over \$50,000.

16. *The testator never intended that his will should take effect, but always intended to revoke it.*

a. He made it originally to be temporary, on the eve of his departure for Europe, Sept. 26th, 1842.

b. He executed it in duplicate, and took one copy with him in order to alter or revoke it, if he saw fit. And left a power of attorney to sell any and every thing.

c. Immediately on his return from abroad, he consulted his counsel about altering it, expressing his dissatisfaction with it, because of the changes which had occurred.

d. In August, 1849, his desire to alter his will was mentioned by Mrs. Parish, in his presence, to Mr. Lord, and again in presence of Fisher.

e. His repugnance to his will, and his desire to abrogate it was so strong, that when, during the long silence of seven years, he attempted to write, the only word he attempted to frame, besides his signature, was the word "will."

f. His attempting to write his name, was at the suggestion

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of others; but his attempt to write "will," was of his own accord, and was repeated by him on several occasions.

g. By vehement and repeated gesticulation, he signified his wish for the box in which the will was kept.

h. He always intended equality in the distribution of his estate, especially between the brothers and sisters.

i. Four times during his sickness, when the several codicils were drawn and executed, he expressed a similar wish.

j. He expressed a wish to disturb the legacies to his brothers' children.

17. The acts of the testator were in conformity with an intention to abrogate his will.

a. He consulted counsel in 1844 about altering it, and had a copy made for that purpose. He also consulted counsel on that subject twice in 1849, once in 1853, and once in 1854.

b. He executed three codicils, which, with the alterations by death and change of property, left a very small part of the will to go into operation.

c. He placed a large amount of his property in the name of his wife, and invested her with the absolute control over it, with the intention of making her its owner.

d. He made large gifts, showing a clear intention that the will should not operate on the amount thus given away.

e. He placed \$75,000 in the hands of his brother-in-law, with the intention of making that a gift to his sisters, or to that brother-in-law. He had, by his will, given \$90,000 to his brothers-in-law on his wife's side, and this was intended as a gift to the only brother-in-law he had on his side. That gift of \$75,000 was never revoked by him. It was voluntarily surrendered by the brother-in-law, at the instigation of others, and not by the action of the testator.

f. He sold, in 1847, the homestead and furniture, and the house in its vicinity, all of which he had specifically devised, and that being his voluntary act, it showed his intention to revoke *pro tanto*. And he made no attempt at compensation until rendered imbecile in 1849.

g. He disposed of every item of personal property that he

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owned, when he made his will in 1842. And so far as any of that was specifically bequeathed, he revoked his will.

h. He not only sold his homestead and furniture, and neighboring property, valued at \$33,000, but he marked on his books, in 1849 (seven years after making his will) a depreciation of \$38,000 in his real estate, and he knew of the destruction of \$30,000 in his New Orleans property, without rebuilding, and thus virtually revoked his will as to \$101,000.

i. He invested over \$200,000 in the purchase of certain real estate, which, not being specifically devised, would go either to the heir-at-law or the residuary legatees, thus diverting the price of the homestead, &c., \$33,000, and the loss on the New Orleans estate, \$30,000, from the devisees of these items to some other beneficiary. All this was done before his sickness, and when he was fully competent to prevent this revocation, *pro tanto*, if he had desired it.

18. *The testator had a general intent as to the corpus of his estate, in connection with his wife and his brothers and sisters; and a special intent as to the numerous other objects of his bounty.*

The general intent must always prevail over the special.

That general intent can be best carried into effect by a total revocation.

In that event the wife would have $\frac{1}{2}$ of personal . . . \$548,243

Her dower in the real estate, valued at \$261,000,

she being 58 years old, would be worth . . . 42,663

Making a total to widow \$585,906

The four brothers and sisters would have one-quarter of residuum, \$881,004; thus producing a result manifestly nearer his general intention than the will or codicils, or either or all of them.

If the widow is right, the brothers will get nothing, instead of over \$50,000, under the will, or over \$400,000 in case of intestacy. If the brothers are right, the widow would get \$298,500, instead of over \$1,000,000, under the will and codicils, or over \$500,000 in case of intestacy.

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POINTS OF LAW.

I. When the codicils were executed, the testator had not a full testamentary capacity, and was under undue influence, and those codicils are all void.

II. The will made in September, 1842, fourteen years before his death, was revoked: 1. By his intention to revoke. 2. By his acts of revocation. 3. By the alteration of estate. 4. By the changes of the beneficiaries under it, and his relation to them.

III. The will being revoked and the codicils void, it is a case of intestacy, in whole or in part.

First. AS TO TESTAMENTARY CAPACITY AND UNDUE INFLUENCE.

I. There is no foundation for any distinction in respect to the codicils.

1. The testator's mind was more impaired at the execution of the first codicil than the others, and had not then recovered its health as much as it did afterwards.

2. The first codicil was as much, if not more, the result of suggestion from others than of his own volition.

II. Testamentary capacity consists of the power of thinking, and the power of uttering thought, and of the power to will, and to express and execute that will. If either of these elements are wanting, testamentary capacity is deficient.

III. It is doubtful if the testator had the necessary capacity to think and to will.

1. Nothing but great mental weakness would have deterred him from using the means of communicating thought by writing or letters, when he had the physical capacity to use either mode.

2. The mental weakness that could produce such a result, and keep the testator for seven years without communion with his fellow-man, cannot be measured, and it is, therefore, impossible to say that he had a sound and disposing mind.

3. The affirmative of proving that he had such sound and

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disposing mind is with the proponents, and any rational doubt on that subject is enough to destroy a testamentary disposition. (2 *Jarm. on Wills*, 51; *Marsh v. Tyrell*, 2 *Hagg.*, 122; *Converse v. Converse*, 21 *Vermont*, 168; *Stewart v. Lispenard*, 26 *Wend.*, 255; *Clark v. Fisher*, 1 *Paige*, 171; *Goble v. Grant*, 2 *Green Ch.*, 629.)

IV. But whatever may have been his mental capacity, it is a conceded fact that he had no power to utter a thought, or express a will, without the suggestion, or at the instigation of some other person.

Thus, if at any time after his attack of paralysis he had wanted to give any part of his estate to his sisters, it would have been impossible for him to do so, because their names were never mentioned to him, and he had no power of himself to mention them.

V. It is also very clear that in the dispositions in his codicils, he was laboring under undue influence in whole or in part.

Many of the ideas in those codicils were suggested by others, and not by himself. He denied or assented to his gift of the Union Square and Wall-street property, according to the form in which the question was put to him.

VI. A will executed under such circumstances is not the free unbiassed action of a sound and disposing mind, which the law demands as a condition to its validity. (*Davis v. Calvert*, 5 *Gill. & John.*, 269; *Bleecker v. Lynch*, 1 *Bradf.*, 458, 471, aff'd on appeal; *Weir v. Fitzgerald*, 2 *Bradf.*, 42; 1 *Jarm. on Wills*, 30, 39, 41; *Clark v. Fisher*, 1 *Paige*, 171; *S. C.*, 2 *N. Y. [2 Comst.]*, 498; *Crispell v. Dubois*, 4 *Barb.*, 393; *Worthington on Wills*, 28, 32; *Ingram v. Hyatt*, 1 *Hagg.*, 384, 404.)

Second. THE WILL MADE IN 1842, FOURTEEN YEARS BEFORE HIS DEATH, WAS REVOKED.

I. *Revocavit vel non* is a question of intention, and all facts showing the intention may be received in evidence. (*Boudinot v. Bradford*, 2 *Yeates*, 170; *Jackson v. Holloway*, 7 *Johns.*, 394.)

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1. From the execution of his will in September, 1842, until his sickness in July, 1849, a period of seven years, the testator's capacity to revoke, both as to intention and the expression of that intention, is unquestioned.

2. From July, 1849, to his death in March, 1856, another period of seven years, he had the capacity to will a revocation, and to give utterance to that intention. It required less capacity of utterance to destroy the will already made, than to make a new one with all its complications of amounts, persons, and articles of property. His difficulty was in the capacity of utterance, not in that of willing.

3. Every expression of his, during those fourteen years, in reference to his will, was that of dissatisfaction with it, and consequent wish that it should not stand. He never was heard to "express" himself content with it, though it was repeatedly the topic of thought and action with him.

4. In the execution of this purpose, he knew of, and acquiesced in, did, or suffered to be done, things which amounted to a revocation, which he knew must have that effect, and which effect he could have prevented in a great degree, if not entirely.

5. Those things were: Death of seven legatees, and the lapsing of legacies to the amount of \$75,000; disposing of every article of personal property, amounting to \$540,000; disposing of every article of personal property specifically bequeathed, amounting to \$10,000; converting real estate, specifically devised, into personalty, to the amount of \$53,000; converting personalty into real, to the amount of over \$200,000, thus changing its descent from next of kin to heirs, and altering the widow's share from an absolute ownership of one-half, to life-estate in one-third; more than doubling his whole estate, and thus, except as to a few specific legatees, entirely changing the distribution of his estate; and executing the codicils.

II. Under these circumstances there was an actual revocation of the will, in whole or in all of it, except the specific legacies. Revocation may be in whole or in part. (*Beck v.*

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McGillis, 9 Barb., 85; *Ward on Legacies*, 261-276; *Coates v. Hughes*, 3 Binn., 498; *Langdon v. Astor*, 16 N. Y., 51; *Harwood v. Goodright*, 1 Cowper, 90.) A subsequent devise of an estate tail revokes, *pro tanto*, a prior devise of an estate in fee. (*Clark v. Berkley*, 1 Eq. Cas. Abr., 412; S. C., 2 Vern., 720.) So if one devise all, and after settle a part, the will is good for the remainder only. (*Coke v. Bullock*, Cro. Jac., 49; *Roll. Abr.*, 616; *Hartness v. Bailey*, *Prec. in Ch.*, 515; *Tucker v. Thurston*, 17 Ves., 130.) Mortgage in fee, after a devise, is a revocation *pro tanto* only. (*Brydges v. Duchess of Chandos*, 2 Ves., Jr., 417.) A settlement in performance of articles, the whole fee being conveyed, and some of the purposes being inconsistent with the will, the will was revoked as to the settled estates. If lands devised are conveyed for a partial purpose, as a mortgage, or for the payment of debts, it is a revocation, *pro tanto*, of a prior devise. (S. C., in the House of Lords, 3 Ves., 685; *Parsons v. Freeman*, 1 Wilson, 308; 3 Atk., 741; *Amb.*, 116.) If testator devised and then suffered a recovery, or conveyed and took back a new estate, it was a revocation *pro tanto*.

III. Ever since the Statute of Frauds passed in the reign of Charles II., in 1641, and our Statute of Wills revised in 1813 (*Roberts on Frauds*, 467, 473; 1 Rev. L., 364, §§ 2, 16), the rule as to revocation under such or similar circumstances has been, that it would be implied.

Copyhold estates are not within the statute. (*Carey v. Asken*, 2 Bro. C., 58; *Rob. on Fr.*, 319, 322, 323; *Burkitt v. Burkitt*, 2 Vern., 498; *Habergham v. Vincent*, 2 Ves., Jr., 205.) Nor is a trust in copyhold lands within it. (*Rob. on Fr.*, 322.) So in case of an agreement to charge lands for the benefit of certain persons to be named by a certain person in his will. Such appointment is not within the statute, and may be made by a not duly attested will. (*Rob. on Fr.*, 327, 332; *Jones v. Clough*, 2 Ves., 365.)

By a will duly executed, charging land generally with legacies, a testator enables himself to lay any number of additional legacies on the land by a subsequent testamentary dis-

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position unexecuted. (*Rob. on Fr.*, 344; *Masters v. Masters*, 1 *P. Wms.*, 423.)

In the case of a devise to pay debts, testator may contract enough to revoke every other devise or bequest. (*Rob. on Fr.*, 345.) Lord Hardwicke, in *Masters v. Masters*, says the Statute of Frauds does not affect the question as to legacies, because it did not prevent a man from creating by will a fluctuating charge.

An annuity was charged on all estate, real and personal, and by an unexecuted codicil, testator gave all the personal to another. The annuity was revoked as to the personal. (*Buckeridge v. Ingram*, 2 *Ves., Jr.*, 652; approved in 8 *Ves.*, 500.) And that, not because the thing given was destroyed, but the fund out of which it was given. So a devise to charitable uses was held not to be within the statute. (*Griffith Flood's Case*, *Hob.*, 136; *Collison's Case*, *Id.*) Terms of years will pass by a will unattested, though they could not thus be created. (*Rob. on Fr.*, 359; *Whitechurch Case*, 2 *P. Wms.*, 236.) So as to fixtures, which can be removed and converted into personalty—*e. g.*, steam-power in a factory. (*Rob. on Fr.*, 365.) Or a devise of corn growing, is good by a will unattested. (*Fisher v. Forbes*, 2 *Eq. Cas. Abr.*, 392.) So a devise of a mortgage may be revoked by an unattested will, because it is regarded as personal. (*Casborne v. Searfe*, 1 *Atk.*, 605.) If in an unexecuted will there is a legacy to the heir on condition that he do not dispute the will, it is enough to put the heir to his election. (*Boughton v. Boughton*, 2 *Ves.*, 12.) A lease and release to the use of a marriage settlement is not within the statute, but is good as an implied revocation. (*Goodtitle v. Otway*, 2 *H. Bl.*, 516.)

THE FOLLOWING ARE CASES OF DEPARTURE FROM A LITERAL READING OF THE STATUTE.

The Statute of Frauds, section 5, requires a Will to be signed by the Testator.—*Lemayne v. Stanley* (3 *Lev.*, 1), holds that if the will is in the testator's writing, and his name is inserted, it is enough. Same point in case of agreements.

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(*Stokes v. Moore, Doug.*, 241.) Sealing a will is a signing within the statute. (*Warnford v. Warnford*, 2 Str., 764.) Making a mark is a signing. (*Harrison v. Harrison*, 8 Ves., 185.) "The statute is satisfied by any symbol of consent and ratification." An acknowledgment by testator will do. (*Rob. on Fr.*, 461.)

The republication of wills of personal estate is not affected by the Statute of Frauds. (*Abney v. Miller*, 2 Atk., 599.)

The Subscription of the Witnesses is to be in the presence of the Testator.—It has been held that it was enough if the testator might see; it was not necessary he should. (See *Shires v. Glascock*, 2 Salk., 688.) As when the testator signed in her carriage, and the witnesses went back into the office and signed their attestation. (*Casson v. Dade*, 1 Bro. C. C., 99.)

He must not only be corporally present, but there must be a mental knowledge of the fact. (*Right v. Price, Doug.*, 241.)

The testator became insensible after executing the will, but before the witnesses could sign the attestation, which, however, they did do then and there, and he was alive and in the same room with them.

The 5th Section requires Credible Witnesses.—Who are "credible?" The courts have construed the word, and converted it into "competent." At first it was held to be determined by the nature of the punishment, as sitting in the pillory. (*Co. Litt.*, 6, b.) Afterwards by the nature of the crime. (*Pendock v. Mackinder, Willes*, 665; *Windham v. Chetwynd*, 1 Bur., 414; *Hindon v. Kersey*, 4 Burn. Ecc. L., 97.) The result was, "credible" means "competent."

The 6th Section makes a Cancelling of the Will a Revocation.—Yet it is well settled that that depends on the intention, and something more is necessary than a mere literal compliance. In *Onions v. Tyver* (1 P. Wms., 343), Lord Cowper held that when a man made a second will devising the same property and cancelled his first, the cancelling amounted to nothing, because he did not intend to revoke his first will unless he could make his second effectual.

The 22d Section declares that Wills of Personal Property

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must be in writing.—It has been held that it is enough if written by the testator, though not signed. (*Rob. on Fr.*, 448.) If signed, but not written by him. (*Id.*) If written by another, though not signed by him. (*Id.*) Then as to the *form* of the writing,—a memorandum or scrap of paper showing a testamentary disposition, is enough. (*Downing v. Townsend, Amb.*, 280.) So of a letter giving an account how testatrix wanted to dispose of her property. (*Rob. on Fr.*, 451.) So a formal will drawn and declared by her right, but not signed. (*Id.*) So where testator died before blanks could be filled in a will drawn to suit. (*Id.*, 452.)

1. An intention to revoke, though not always essential to a revocation, yet is an important element, not only in characterizing acts proved, but in determining the question of *revocavit vel non*.

a. Our statute has recognized this, in rejecting parol evidence of such intention. (2 *Rev. Stat.*, 64.)

b. But the effect of intention, when properly proved, is well recognized. (*Brush v. Wilkins*, 4 *Johns. Ch.*, 517; *Johnston v. Johnston*, 4 *Phill.*, 447; *Marston v. Roe*, 8 *A. & E.*, 14; *Walton v. Walton*, 7 *Johns. Ch.*, 258.)

2. The alteration of circumstances connected with the testator and his personal relatives, or those who would naturally be the objects of his bounty, is often enough to work a revocation. Thus, in marriage and birth of children. (*Marston v. Roe*, 8 *A. & E.*, 14; *Parsons v. Lanoe*, 1 *Ves.*, 191; *Gibbons v. Caunt*, 4 *Id.*, 848; 3 *Ph. Ev.*, by *Edwards*, 608; *Israell v. Rodon*, 2 *Moore P. C.*, 51; *Overbury v. Overbury*, 2 *Show*, 242; *Doe v. Lancashire*, 5 *T. R.*, 49.)

In a case of subsequent marriage and birth of child. (*Gibbons v. Caunt*, 4 *Ves.*, 848.) The same ruling was extended to the case of a will before marriage, and then death, followed by birth of a posthumous child. (*Doe v. Lancashire*, 5 *T. R.*, 49.) It was extended to the case of a widower, who married and had issue, though his will was in favor of the issue by the first marriage. (*Holthway v. Clarke*, 1 *Phill.*, 339.)

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Such a change is not merely presumptive evidence of an intention, but is an absolute revocation, on the ground of a tacit condition. (*Ieraell v. Rodon*, 2 *Moore P. C.*, 51.) That such revocations are not excluded by the Statute of Frauds, has been considered as settled ever since the case of *Christopher v. Christopher*, in the Exchequer, in 1771, and revocations are necessarily implied or presumed from so material a change in circumstances as marriage and birth of a child. (*Kneebel v. Scrafton*, 2 *East*, 530.)

A will by a father, on the assumption of his son's death, and of a wife, on the assumption of her husband's death, revoked by their being alive. (1 *Lee*, 120; 5 *E. E. R.*, 325; *Ward on Legacies*, 261-276; *Campbell v. French*, 13 *Ves.*, 321.)

An advancement is a revocation. (*Lovell on Wills*, 367, 371; *Worthington on Wills*, 86; *Story Eq. Jur.*, §§ 1111, 1112; 2 *Williams on Ex'rs*, 946.)

3. The alteration of estate is often enough to work a revocation. (*Lugg v. Lugg*, *Salk.*, 592; *Christopher v. Christopher*, *Dickins*, 445; *S. C.*, 4 *Burr.*, 2171, note; *Id.*, 2182; *Brady v. Cubit*, *Doug.*, 30; *Bullin v. Fletcher*, 1 *Keen*, 377; *S. C.* on appeal, 2 *My. & Cr.*, 438; *Ward v. Moore*, 4 *Mad.*, 368; *Adams v. Winne*, 7 *Paige*, 97; *Cave v. Holford*, 3 *Ves.*, 650; *S. C.*, 7 *T. R.*, 399; 1 *B. & P.*, 576; *Walton v. Walton*, 7 *Johns. Ch.*, 258; *Toller on Executors*, 19, 22; *Clapper v. House*, 6 *Paige*, 149; *Sparrow v. Hardcastle*, 3 *Atk.*, 798.)

A. devises a mortgage and forecloses, or takes a release of the equity of redemption; it is a revocation as if he cancelled the mortgage and took an absolute deed, for it was an alteration of interest and a new purchase. (*Ballard v. Carter*, 5 *Pick.*, 112.)

A man in his will manumitted his slave, and afterwards sold her; held to be a revocation. (*Matter of Nan Mickel*, 14 *Johns.*, 324.)

If a father gives a daughter a portion by will, and afterwards gives to the same daughter a portion in marriage. This by the laws of all other nations, as well as of England, is a revocation of the portion given by the will. (*Hartop v.*

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Whitmore, 1 P. Wms., 182.) In this case Lord Hardwicke says: As to the objection of his having lived so long after giving the portion to his child (four years) on her marriage without ever revoking that part of the will, there could be no need for the father to revoke that legacy which he before had done by giving the portion in his lifetime, since that would be but revoking the same will twice.

Wherever an estate is modified in a manner different from that in which it stood at the time of making the will, it is a revocation. (*Livingston v. Livingston*, 3 Johns. Ch., 156; *Parsons v. Freeman*, 3 Atk., 748; S. C., 1 Wils., 308.)

Lord Hardwicke rules: It is admitted on all hands that if testator, having a legal estate, devises it and suffers a recovery, it is a revocation; or if he devises and then conveys, though he takes back a new estate, if he levies a fine to his own use in fee, it is a revocation. (*Amb.*, 116. See *Parker v. Biscoe*, 3 Moore, 24.)

Ch. J. Traver held that the least alteration of interest worked a revocation. (*Arthur v. Breckenham*, *Fitzgib.*, 240.)

Testator after a devise conveyed the estate and took back a declaration of trust, which was performed and ceased, so that he was entitled to a reconveyance; still it was a revocation, because the estate did not continue in the same condition. (*Sparrow v. Hardcastle*, 7 T. R., 416, n.; 3 Atk., 798. See *Swift v. Roberts*, *Amb.*, 618.)

The whole subject was fully discussed several times and settled, that where a testator, after a will, conveyed to trustees in trust for himself in fee till marriage, and in default of issue, to use of self in fee, and he married and died without issue, it was a revocation, because of the alteration in estate. (*Cave v. Holford*, 3 Ves., 650; 7 T. R., 399; 1 Bos. & Pul., 576.)

Bennett v. Tankerville (19 Ves., 170); *Knollys v. Alcock*, (5 Ves., 654); *Williams v. Owens* (2 Ves., Jr., 601); *Cotter v. Loyer* (2 P. Wms., 622); and *Mayor v. Garland* (*Dickins*, 563), are all to the point that an executory contract to sell land devised, is a revocation of the devise.

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Chancellor Kent says, in *Walton v. Walton* (7 Johns. Ch., 258); either a change of the estate, or an act, though nugatory in itself, evincing an intention to revoke, will amount to a revocation. So where testator sold the devised estate and took a mortgage back, all was revoked, because it was a change from realty to personalty. (*Adams v. Wians*, 7 Paige, 97.) It was held in *Beck v. McGillis* (9 Barb., 35): 1. That a sale of devised property, though a mortgage back, was a revocation. 2. And so of a devise of a mortgage, a foreclosure, and a new mortgage taken.

A bequest of a lease and furniture of a house was revoked, by the expiration of the lease, a sale of part of the furniture, and removal of the residue to another house. (*Colecton v. Garth*, 6 Simons, 19.) As to revocation by sale or disposition, see *Francois v. Collier* (4 Russ., 331); *Bullin v. Fletcher* (2 Myl. & Cr., 439); and *Lock v. Foot* (5 Sim., 618). Where lands contracted for are devised, if the subsequent conveyance is so framed that the legal estate is modified from the equitable possessed at the time of the devise, it is a revocation. (*Bullin v. Fletcher*, 1 Keen, 377.) The effect of the alteration of the estate is wholly independent of intention, and sometimes violates the intention clearly indicated. (See *Randlins v. Burgie*, 2 V. & B., 386; 2 My. & Cr., 438.)

It has been urged that the rules and distinctions acted upon in these cases have been disapproved by eminent persons. As an argument of this nature may make the judge more cautious in concluding that a rule which he supposes to be applicable to a case really is so, there is no impropriety in it; but whether the authorities relating to revocation be open to great objection, and whether it is or not a subject of regret that they should have been applied to cases of this nature, would not afford ground to deviate from decisions which have been acquiesced in, and have for many years furnished a rule for determining the rights to property. It is the duty of a judge to administer the law according to the evidences of it which are to be found in the authorities and in the recognized practice of the profession. The inquiry

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before him is not what the law ought to be, but what it is and how it ought to be applied to the particular cases under consideration.

It may be lamented that the law upon any subject is in such a state as to induce eminent judges and writers to express their disapprobation of it, and their regret that they are bound to give it effect, but it would be still more to be lamented if judges should be found who thought themselves at liberty to declare the law according to their own fancies of what it ought to be. All stability would be lost, and the law which should be administered on clear and fixed principles would be involved in uncertainty and confusion.

A devise of two lots by one who was under-lessee of them, is adeemed by his afterwards taking an assignment of the leases. (*Porter v. Smith*, 16 *Sim.*, 251.) Two checks given in September, 1833, and a will dated November, 1834, together admitted to probate as a will; yet the latter held a revocation of the checks. (*Walsh v. Hadstone*, 18 *Sim.*, 261.) Testator devised £10,000 to M., and afterwards transferred £12,000 consols to joint names of testator and M. Held, an ademption. (*Twining v. Powell*, 2 *Collyer*, 262.) In *Vassar v. Jeffry* (3 *Russ.*, 479), the lord chancellor said, upon the authority of several cases (*Ryder v. Wager*, 2 *P. Wms.*, 328; *Cotter v. Laver*, 2 *Wms.*, 122; *Knollys v. Alcock*, 5 *Ves.*, 648), that an agreement to convey, constitutes a revocation. In *Bullin v. Fletcher* (2 *Myl. & Cr.*, 488), the lord chancellor said: In *Parsons v. Freeman* (3 *Atk.*, 471), Lord Hardwicke establishes the principle, that whenever the estate is modified in a manner different from that in which it stood at the time of making the will, there is a revocation. A subsequent conveyance which made an alteration in the quality of the estate is a revocation. (*Ward v. Moore*, 4 *Mad.*, 368.) Though a trust to pay debts is no revocation, yet where in the deed there is a provision that after paying debts, the trustee should pay to such persons as the testator should appoint; and in default of an appointment to himself in fee, that is a revocation. (*Kemyon v. Sutton*, cited in 2 *Ves., Jr.*, 600.)

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So a conveyance to pay debts with surplus to the wife, is a revocation. (*Hodges v. Green*, 4 *Russ.*, 28.) Testator made a contract for the sale of land devised in his will, under which the purchaser took possession and paid part of the purchase-money, then becoming bankrupt, the property was sold in satisfaction of the testator's lien for the unpaid purchase-money and bought in by the testator,—the property not being reconveyed to him, but released to him by the bankrupt's assignees. The testator died seized, and the court held the will was revoked as to that land, and that such revocation was not done away with by the subsequent regaining of the land. (*Andrew v. Andrew*, 39 *Eng. L. & E.*, 158.)

If the legal estate which the testator acquires by the conveyance, differs in quality from the equitable estate, which he had at the date of the will, the conveyance revokes the devise. (*Plowden v. Hyde*, 9 *Eng. L. & E.*, 243.) And so in the case of a contract for purchase, if the legal estate which the testator acquires by the conveyance differs from that which by the terms of the contract the vendor agreed to convey to him, the conveyance revokes the devise. And this revocation equally takes place even though the testator after the conveyance has as absolute a power of disposing of the property as he had before. And the revocation takes place without regard to the testator's intention, and even in direct contravention of his intention. S. C. affirmed on appeal (13 *Eng. L. & E.*, 180), where this was ruled: If a person seized in fee made his will, devising land, and afterwards conveyed the legal estate so as to take it back to himself not in fee, this is a revocation (see, also, *Schroder v. Schroder*, 31 *Eng. L. & E.*, 197; *Francis v. Collier*, 4 *Russ.*, 331; *Lock v. Foote*, 5 *Sim.*, 518); all cases of change of interest in the estate working a revocation.

A mortgage was devised, paid, and the amount reinvested,—held to be a revocation. (*Gardner v. Hatton*, 6 *Sim.*, 93.) A devise of all testator's property in the funds which he sold and invested on mortgage, was revoked thereby. (*Hayes v. Hayes*, 1 *Keen*, 97.) A renewal of a lease was a revocation

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of a bequest of it. (*Marwood v. Turner*, 3 P. Wms., 163; *Coffin v. Fernyough*, 2 Bro. C. C., 291.) A revocation of the appointment as an executor, is a revocation of a legacy to him. (*Roach v. Haynes*, 8 Ves., 593. See *Abbott v. Massie*, 3 Id., 148; *Harrison v. Rowley*, 4 Id., 212; *Mascal v. Mascal*, 1 Id., 323; *Ward v. Moore*, 4 Madd., 368; *Toll. Ex'rs*, 22.) An ineffectual attempt to grant or devise property already devised by will, will amount to a revocation, and so the codicils of the testator in this case, though void as a testamentary disposition, are yet good as a revocation. (*Exp. Ilchester*, 7 Ves., 372; *Montague v. Jeffreys*, *Moor*, 4, 291; 1 *Roll. Abr.*, 615; *Beard v. Beard*, 3 Atk., 72; *Harwood v. Oglander*, 6 Ves., 215; *Darley v. Darley*, 3 Wils., 6.) The testator suffered a recovery which was absurd, and useless, and utterly bad, and without any reasonable meaning to be deduced from it, yet it was a revocation. (*Dister v. Dister*, 3 Lev., 108.) A devise to a person incapable of taking, is a revocation. (*Roper v. Radcliff*, 10 Mod., 230.) The principle is stated that an act nugatory in itself, is yet good as a revocation. (*Walton v. Walton*, 7 Johns. Ch., 258.)

If an incomplete testamentary disposition shows an intention to revoke, it is good as such. (*Kidd v. North*, 2 Phillips, 91; citing *Jackson v. Jackson*, 2 Cow, 35; *Atty.-Gen. v. Harley*, 4 Madd., 263; *Heming v. Clutterbuck*, 1 Bligh, N. S., 479; *Fraser v. Byng*, 1 Russ. & Myl., 90.)

Where testator intends a complete conveyance, and dies before it is perfected, as feoffment *sans* livery, it is a good revocation. (*Clymer v. Littler*, 1 W. Bl., 349.) A deed intended to operate as an assignment of uses, but not sufficient for that purpose, is good as a revocation. (*Shove v. Pincke*, 5 T. R., 124; citing 2 Salk., 292; 1 *Roll. Abr.*, 615, pl. 30; *Wentworth Off. Exs.*, 22.) If the instrument be complete, but inoperative from the incapacity of the taker, it is a revocation, because the act was enough to alter the testator's intent. (*Beard v. Beard*, 3 Atk., 72; S. P., *Roper v. Constables*, 2 Eq. Ca. Abr., 359, p. 9.)

A second will signed, but not attested, is good as a revoca-

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tion, though futile as a disposition. (*Onions v. Tyrer*, 1 P. Wms., 343; *Pre. in Ch.*, 459.)

The foregoing cases show that by the law, as well settled at the time of the enactment of the Revised Statutes, this will, or at least the residuary clause of it, was revoked by the intention of the testator; by a change of parties; by an alteration of the estate; and by the attempt to change the disposition by means of the codicils, gifts, and otherwise.

IV. The Revised Statutes have not changed the law in this respect, nor intended to change it.

1. The revisors' notes are not evidence of the meaning of the statute. (*Sedgw. on Stat.*, 430; *Forrest v. Forrest*, 10 Barb., 46.)

a. The law prior to the Revised Statutes being well settled by adjudications, a change of phraseology is not a change of the law, unless such change of phraseology evidently purports an intention to work a change. (*Sedgwick on Stat.*, 428; *In re Yates*, 4 Johns., 359; *Taylor v. Delancy*, 2 Cai. Cas., 243; *Elwood v. Klock*, 13 Barb., 55.)

b. The intention of the Legislature to alter the law must be evident, or the language of the new act must be such as palpably to require a different construction, before the courts will hold the law changed upon such revision, merely from the fact of a change of language. (*Croswell v. Crane*, 7 Barb., 195; *Gaffney v. Colwill*, 6 Hill, 574; *Theriat v. Hart*, 2 Id., 280; *In re Brown*, 21 Wend., 316, 319.)

c. The section of the Revised Statutes (2 Rev. Stat., 64, § 42) is merely a revision of the Revised Laws, and is so declared by the revisors (3 Rev. Stat., 8 ed., 631), and, therefore, is not to be regarded as any alteration of the law.

d. Besides, the Legislature not having adopted the plan of the revisors, but having omitted some of their plan, and added some parts to it, cannot be regarded as adopting their notions in full. See section 44 (2 Rev. Stat., 64), which the Legislature altered, though it was recommended purposely to cover the whole ground, and was altered so as not to do so.

2. The Legislature cannot be regarded as having intended to include all cases of implied revocations, because it was not possible for the Legislature by any statute to put an end to them. Thus, if A. devises a farm, then sells it and spends the price; or, if B. makes a bequest of a watch, and sells it or loses it, or of a horse or an ox, and it dies, or is killed before testator dies; or of a dwelling-house or furniture, and they are destroyed by fire; or of a ship and cargo, and they are totally lost at sea; in all these, and in various kindred cases, there is an implied revocation which no statute can prevent, and which it is at once apparent was not met nor intended to be met by the statute.

3. There is, therefore, a class of cases where, from sheer necessity, there must be an implied revocation, even beyond what the statute has provided for, and it is wrong to say that there can be no revocation of any will unless it is particularly mentioned in the statute. The statute reaches a certain class, and regulates them, and those not within that class are not reached by the statute.

4. It was so with the English Statute of Frauds: sections 6 and 22 of which were as follows: Sect. 6. "No devise in writing, of lands, &c., or any clause thereof, shall at any time after, &c., be revocable otherwise than by some other will or codicil in writing, or other writing, declaring the same, or by burning, &c." Sect. 22. "No will in writing, concerning any goods, or chattels, or personal estate, shall be repealed, nor shall any clause, devise, or bequest therein, be altered or changed by any words, or will, by word of mouth only, except the same be in the lifetime of the testator committed to writing." (*Act of 29 Car. II., ch. 3, §§ 6, 22; Rob. on Fr., 467; this act was passed in 1641.*)

5. At first, and for about forty years, that act was read just as strictly and literally as it is contended we must read our Revised Statutes. But the cases of implied revocations by necessity arose, and the English courts yielded to such necessity. The following cases will trace their decisions down from 1682 to the present time, and beyond the English Stat-

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nte of Wills adopted in 1838, and based on our Revised Statutes:

In 1682, *Overbury v. Overbury* (2 *Show*, 242). In 1689, *Sugg v. Sugg* (*Salk.*, 592). In 1748, *Parsons v. Lanoes* (1 *Ves.*, 189). In 1771, *Christopher v. Christopher* (*Dickins*, 445; S. C., 4 *Burr.*, 2171, n.; 2182, n.) In 1778, *Brady v. Cubitt* (*Doug.*, 30). In 1793, *Doe v. Lancashire* (5 *T. R.*, 49). In 1836, *Bullin v. Fletcher* (1 *Keen*, 377; S. C. in appeal, 2 *My. & Cr.*, 432). In 1838, *Marston v. Roe* (8 *A. & E.*, 14). In 1852, *Plowden v. Hyde* (9 *Eng. L. & Eq.*, 243; S. C., 13 *Id.*, 175). In 1856, *Andrew v. Andrew* (39 *Id.*, 158).

6. The enactments contained in these two sections of the English Statute of Frauds, were incorporated into the revisions of our statutes, in 1801, 1813, and 1830. (1 *Rev. L. of 1801*, 178, §§ 3, 16; 1 *Rev. L. of 1813*, 365, § 3; 367, § 16; 2 *Rev. Stat.*, 64, § 42.) And the current of English decisions was received by us, and incorporated into our jurisprudence. (1 *Jarm. on Wills*, Perkins ed., 152; 4 *Kent Com.*, 521; *Brush v. Wilkins*, 4 *Johns. Ch.*, 506; *Walton v. Walton*, 7 *Id.*, 258; *Adams v. Winne*, 7 *Paige*, 97; *Beck v. McGillis*, 9 *Barb.*, 35.) And the same rule has been adopted in others of the States of the Union, where these enactments of the Statute of Frauds were in force. (*Semmes v. Semmes*, 7 *Har. & Johns.*, 388; *Burns v. Burns*, 4 *Serj. & Raw.*, 295; *Havard v. Davis*, 2 *Binn.*, 406; *Boudinot v. Bradford*, 2 *Yeates*, 170; *Bates v. Holman*, 3 *Hen. & Munf.*, 502; *Witter v. Mott*, 2 *Conn.*, 67.)

7. The rule, then, existing both in England and in this country, notwithstanding the Statute of Frauds, declares that a will, under the circumstances which attend this of Henry Parish, is revoked. (*Johnston v. Johnston*, 1 *Phill.*, 447; *Brush v. Wilkins*, 4 *Johns. Ch.*, 506; *Sherry v. Lozier*, 1 *Bradf.*, 437; 4 *Kent Com.*, 528; 3 *Ph. Ev.*, by *Edwards*, 608; *Langdon v. Astor*, 16 *N. Y.*, 51; *Betts v. Jackson*, 6 *Wend.*, 178.)

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WILLIAM M. EVARTS, *on behalf of the Proponents,*

Put in the following brief in reply to some questions of law discussed in the contestants' argument.

I. The statutes of this State express the rule in respect to testamentary capacity, by which the question must be determined whether any particular person has or has not power to make a will. (2 *Rev. Stat.*, 56, § 1; *Id.*, 60, § 21.)

The latter section was reported by the revisors to the Legislature, with fourteen years as the age of competency for males, and twelve for females, and with a suggestion that those ages were too young. It was in reply to this suggestion that the Legislature increased the ages, and inserted the words "and no others," to exclude the idea that younger persons might still make wills of personalty as at common law. (3 *Rev. Stat.*, 2 ed., 629, rev. note.) That the whole section is thrown into the form of permitting certain persons to make wills, rather than that given to the provision in regard to devises of real estate, which excepts certain persons as incapable out of a general permission to all, is to be attributed to its greater simplicity of construction in the present form, and not to any difference of intent on the part of the Legislature. Under each section the intent is the same, viz., that all persons, not by law disabled, may make wills. The same exception occurs in the statute relating to the alienation of lands. (1 *Rev. Stat.*, 719, § 10.)

Although under the two sections relating to real estate, the persons incapable to alien or devise are designated as "idiots, or persons of unsound mind," and under the section as to wills of personalty, the persons incapable are those not "of sound mind and memory," yet there can be no doubt that this verbal difference in expression does not indicate any difference in the substance of the rule of exclusion. That no ground can be conceived of on which to found a difference is apparent. General permission to alien property in life and at death is the purpose and policy of the Legislature; the

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exceptions to the power are founded on the existence of a personal disability in the owner, and rightfully depend on the nature and extent of the ground of disability, and not on the kind of property. The use of the same terms in earlier statutes, shows that they are not different in meaning. Thus the exception in the old statute of wills, is of wills made by any "idiot or person of insane memory." (1 Rev. L., 365, § 5.) In the act concerning fines and recoveries, the parties to the fine are required to be "of sound memory," and the fine is declared to bar all persons "of sound memory" who do not sue in five years. (1 Rev. L., 368, § 1.) In sections 7 and 12 of the same act (pp. 361, 363), the rights of persons "not of sound mind" are saved from the bar declared in the preceding section.

In the early English statute concerning fines (18 Edw. I.), all persons in the world "*de bone memorie*" are declared barred, which words Coke translated "of good memory" (1 Inst., 510), and employs as the contrary of "*non compos mentis*." (Id., 516, n. 18.) These words, "*non compos mentis*," occur in the Statute of Westminster 2d, ch. 48 (13 Edw. I.), and are translated by Coke "not whole of mind." (2 Inst., 480.) The same words are said by Littleton (section 405), to be of the same meaning as "*de non sane memorie*," and they are used interchangeably in the old pleadings as the different names of a certain and definite mental state known to the law, and affording the ground and criterion of legal action. Thus, to refer to a single case only, in an action of trespass which turned on the validity of a deed executed by one whose capacity was disputed. The traverse alleged that the grantor was of good memory; without this, that he was out of his sound or sane memory, "*extra sanam memoriam suam*." It was objected that the writ appropriate to the recovery of lands aliened by a person incapable to convey, used the term "*non compos mentis*," and that therefore the traverse should be taken in those words; and further, that in the form proposed the traverse would include the deed of a sick or drunken man, whose deeds were good. It was answered,

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that the sick or drunken man has "his entire memory," and the traverser was held well pleaded. (39 Hen. VI., 48, b.) The argument expressed a little more at large was this: "*non compos mentis*" is the exact legal designation of the state which, if it exists, will avoid the deed, and should therefore be used; whereas "*extra sanam memoriam suam*" describes a drunken or sick man, as well as one *non compos*. The decision, and the reason assigned, "that the sick and drunken have their entire memory," show that the words, "out of sound memory," were employed, not as descriptive terms, but as the name of a condition, and were equivalent in legal significance to "*non compos mentis*," and that being "of good memory," or "of entire memory," is equivalent to "*compos mentis*." No new meaning, therefore, has been imparted to the rule of law in respect to mental incapacity, by the use of the terms "of sound mind and memory" in the statute regulating wills of personal property. They do not require the courts to enter into any metaphysics, as to the nature of mind or of memory, or of soundness or unsoundness, as if those words were words of mere description, nor to fix from such considerations a standard of capacity based upon the meaning of these separate terms. Their meaning, on the contrary, is to be ascertained by finding from legal decisions to what states of mind those terms have been appropriated as a name. That such a reference must be had, is apparent as soon as an attempt is made to define the term "sound," in its connection with mind or memory. We say even of men of ability, that their minds are unsound when their own ingenuity persuades them of the truth of propositions which the common sense of mankind rejects, and yet we do not intend to impute to them, by the expression, legal unsoundness, which entails an incapacity to make deeds or wills.

Before entering directly on the inquiry to ascertain what is the mental state referred to in the statutes, of which incapacity is the legal consequence, it should be observed that a person who falls within the class of incapables can make no alienation of land, no will of real or of personal estate.

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The incapacity is absolute. He can no more make a very simple will, than a very complex one. There are no grades of capacity declared. If capacity exists to make the simplest conceivable disposition, the most complicated one cannot be rejected on the score of want of capacity. The rule of the statute is then to be applied to the owner of property, anterior to the consideration of any particular act of disposition. If found incapable according to the meaning of the statute, then the law denies to him the exercise, in these several forms of disposition, of that dominion over property which is fundamental in our notions of it. Now, in our system of society and of law the present owner alone has any right or interest in property. He has the power to destroy it or to give it away unquestioned. No expectant heir can allege any interest in it, but is as much a stranger to that which he hopes to inherit as he is to that which he expects to earn or create. This exclusion of any right of interest in another is, of course, necessary to the existence of property in a complete and absolute sense. For just in so far as any other than the present owner should, by law, be given any right, interest, or authority, or should be considered in the framing of rules in respect to the disposition of property, so far would the present owner's right and property be diminished and conferred upon that other. We therefore confidently urge that, in the exposition of these statutory provisions they are not to be regarded as made in the interest of heirs or expectants of any sort: nor are they to be deemed a diminution of the present owner's right of disposition. They are intended, on the contrary, to further and advance the general policy of our law on the subject of property, by insuring to the owner the complete power of disposition, to take effect either in his lifetime or at his death, and according to his mere pleasure. Whatever ceremonies are imposed as necessary to the legal validity of the act of disposition, are founded upon considerations either of affording and preserving proof of the act, or of protecting the owner against the fraudulent substitution of an instrument not in accordance with his purpose.

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II. The only rule of mental capacity in respect to feebleness of mind as distinguished from insanity, which will harmonize with this settled policy of the law as to the right of property, is that which leaves the power of disposition unrestrained if the owner have any mind. If he have any mind at all, the law should not pronounce him incapable of assent to any disposal of his property. Whether he has assented to any particular disposition is a different question from that of capacity. The authoritative decisions in this State have maintained the views which have been stated, with great distinctness and steadiness. In *Jackson v. King* (4 Cow., 207), a deed was questioned on the ground of the incapacity of the grantor. WOODWORTH, J., giving the opinion of the court on granting a new trial, says, "It must be shown that the grantor was *non compos* within the legal acceptance of the term; that it was not a partial, but an entire loss of the understanding; for the common law seems not to have drawn any discriminating line by which to determine how great must be the imbecility of mind to render a contract void, or how much intellect must remain to uphold it. But weakness of understanding is not of itself any objection, in law, to the validity of a contract. If a man be legally *compos mentis*, he is the disposer of his own property." In *Odell v. Buck* (21 Wend., 142), which was also a question of the capacity of the grantor of a deed, BRONSON, J., giving the opinion of the court, says: "Buck, at the time the deed was executed, was not a lunatic, or one who had lost the use of that reason or understanding which he once had. He was not an idiot, or one that hath no understanding from his nativity. Although a man of imbecile mind, he had reason and understanding. Fraud was not set up as a ground of avoiding the deed, but the case turned wholly on the incapacity of the grantor to contract. It is impossible to say that this deed was void. No part of the evidence goes far enough to show a total want of understanding."

The opinion of Senator Verplanck in *Stewart v. Lispenard* (26 Wend., 255), is especially deserving of notice, both for its

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profound philosophy and its accurate appreciation of the authorities. The principles involved in the judgment as announced by him have been followed in the courts of this State, except in the Surrogate's Court of New York, where the doctrine (if it can be called a doctrine), that they only are competent to make wills, whose wills, when made, that court on the whole approves, would still seem to have some sway.

The cases of *Blanchard v. Nestle* (3 Den., 37), and *Osterhout v. Shoemaker* (*Id.*, note), in the Supreme Court, show a free and clear approval and adoption of the reasoning and principles of Senator Verplanck's opinion. In *Newhouse v. Godwin* (17 Barb., 246, 257-8), Mr. Justice Strong, giving the opinion of the court, recognizes the rule as certainly established by the cases, that mere feebleness of intellect, however considerable in the testator, will not invalidate a will. The difficulty which Judge Strong felt and expressed, arose from the seeming incongruity of calling a person whose intellect, from natural or acquired defects, was but the next degree above positive idiocy or lunacy,—a person of sound mind and memory, in the language of the statute. That incongruity would not have appeared to him to exist, if he had adverted to the fact that those terms were exactly equivalent in the law to "*compos mentis*," and embraced all persons not "*non compos mentis*." Judge Gridley, in *Stanton v. Wetherowax* (16 Barb., 261-2), felt no such difficulty, recognizing at once both the equivalence of the terms "not of sound mind and memory" and "*non compos mentis*," and also the accuracy of the designation of the general classes of "*non compotes*," as set forth by Lord Coke and adopted by Blackstone; according to which, besides idiots from birth and lunatics, those persons only are included who, by sickness, grief, or other accident, wholly lose their understanding. In the Court of Appeals, *Clarke v. Sawyer* (2 N. Y. [2 Comst.], 498) is the only reported case in which this subject came under discussion, and, according to the report, a majority of the court did not pass upon the question of mental capacity; but SHANKLAND, J., who gave the opinion, recognizes the authority

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and force of *Stewart v. Lispenard* and *Blanchard v. Nestle*, as confining incapacity to the lunatic and the idiot.

This being the state of the authorities in New York upon this subject, it is not surprising to find the overthrow of the decision in *Stewart v. Lispenard* attempted by an array of cases from all quarters, which seemed to afford promise of assistance, as well as by an attack upon the accuracy of the opinion in that case, both in its statement and in its appreciation of the authorities on which it professed to be based. In regard to the cases cited which have any claim to be regarded as authoritative in this State, it must for the present suffice to say, that they were before the Court of Errors when *Stewart v. Lispenard* was decided, and that so far as they differ in doctrine from that case, they have been overruled by it, and by those cases which have followed and approved it.

The first ground of the direct grounds of attack is, in substance, that the cases cited by Senator Verplanck in support of the standard of mental capacity maintained by him, relate mainly to the prerogative of the crown to take into its custody the persons and estates of idiots and lunatics. That this prerogative, in its nature odious, was always strictly construed, and that the cases and opinions relating to it are not authoritative on the subject of testamentary capacity. Now, the prerogative in respect to idiots might be odious, inasmuch as the king took the profits of the estate of natural fools or idiots from birth, to his own use. But the other branch of the prerogative, which relates to other *non compos* who were born of sound memory, and have become *non compos*, does not seem subject to the same odium, and consequent narrow construction; for the profits of their estates the king took not to his own use, but wholly to the use of the *non compos* and his family. (*Beverly's Case*, 4 *Coke*, 126 b, 127 b.) But one of the most direct and strongest authorities cited by Senator Verplanck, though it does not relate in terms to testamentary capacity, has not any relation to the subject of the prerogative. It is *Coke's commentary* on sections 405 and 6 of Littleton, in the chapter on Descents,

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the latter of which relates to the right of the heir to avoid a feoffment made by his ancestor when *non compos*.

Lord Hardwicke's observations in *Barnsley's Case* (3 *Atk.*, 168, 173) show that when the question was of exercising the prerogative for the custody of the persons and estates of those of unsound mind, the same standard of intellectual capacity was acted on as the courts of law applied, when for other purposes it became necessary for them to say what constituted unsound mind. He held, in substance, that there was no specially narrow and restricted sense in which the term *non compos* was applied in questions relating to prerogative proceedings. It is obvious that the inquiry to which Lord Hardwicke addressed himself, was, Who is *non compos*, within the Statute of Fines, whom a fine will not bar if he be not a party to it, and who may not be a party; who is *non compos* within the meaning of the Statute of Limitations against whom it shall not run; who is *non compos*, so that his heir shall have a writ to avoid his feoffment? He had before him a return that Barnsley, from the weakness of his mind, was incapable of governing himself and his lands and tenements, and he recognized the possible usefulness of setting a curator or tutor over prodigal and weak persons, as in the civil law; but finding that the courts of law had invariably regarded the words *non compos* as importing a total deprivation of sense, he did not feel at liberty to act on any finding which in substance came short of that. We say, then, that there is no ground of authority for saying that the law adopts any sense of the terms *non compos mentis*, in their application to persons idiotic, or of weak or imbecile mind, which does not import a complete deprivation of reason or sense.

Another, and the most elaborate occasion of criticism on the case of *Stewart v. Lispenard*, seems to be the use, in the last clause of the reporter's first head-note, of the words, "if he be not totally deprived of reason." The line of critical observation is this: that the head-note is taken almost word for word from *Shelford on Lunacy*, with the exception that, instead of the words above cited, Shelford uses the words

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"if he be legally *compos mentis*." That the paragraph in Shelford is taken from a note by Powell, in his edition of *Swinburne on Wills*. That Powell's authority for his note is *Osmond v. Fitzroy* (3 P. Wms., 129), in which Sir Joseph Jekyll, M. R., says, "equity will not set aside the bond, only for the weakness of the obligor, if he be *compos mentis*; neither will this court measure the size of people's understandings or capacities, there being no such thing as an equitable incapacity where there is a legal capacity." That in this passage, Sir Joseph Jekyll does not define the standard of capacity at law or in equity, but simply affirms its identity, "which no one disputes;" and that he does not say that there must be a total deprivation of reason to constitute incapacity; and finally, that the words, "if he be not wholly deprived of reason," are to be found neither in Powell's note nor Shelford's text, nor in the case which Powell cites, nor even in *Bath & Montague's Case*, which the counsel cites, but that in each of those places the words are, "if he be legally *compos mentis*." This is true to the letter. But in order that it should be effectual to diminish the force, as authority, of the case criticised, it was necessary to show that the reporter's duty in some way required him to state, not the doctrine of the case which he was reporting, but that of some other case which he was not reporting, but which had furnished some elements to the decision.

Senator Verplanck in his opinion quotes Shelford's language, "if a man therefore be legally *compos mentis*," and also quotes Lord Hardwicke's language, that "*non compos mentis*" imports "a total deprivation of reason" as contradistinguished from weakness of mind; and the judgment given proceeds upon the basis that Lord Hardwicke's interpretation of those words, and his understanding of the rule of law, were correct. If Sir Joseph Jekyll differed from Lord Hardwicke on a question of law, looking to the mere authority of names, it would certainly be pardonable to follow the latter; but as Sir Joseph did not give his opinion, and Lord Hardwicke gave his, and the Court of Errors agreed with him in

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opinion, it was surely not improper for the reporter of the decision to make the substitution of the one phrase for the other, and thus make his head-note distinctly enunciate exactly what the court had decided.

There is certainly no reason to suppose that Sir Joseph Jekyll or Chief-justice Holt used the terms "*legally compos mentis*" in any different sense than that which Lord Hardwicke said belonged to them: nor after the true sense of the terms had been once elucidated by so eminent a judge as Lord Hardwicke, are we to expect to find the same exposition often repeated in the books. It happens, however, to have occurred in *Rockfort v. Lord Ely* (*Ridgeway's Cases in Parliament*, 532). Lord Chancellor Lifford says, "There is no such thing as equitable insanity; it is a legal thing understood according to a legal definition. A deprivation of sense and a total want of understanding to contract; a deprivation of a man's reason, as is said by Lord Hale. The genus of it has been described also by the general words '*non compos*;' weakness does not carry that idea with it. Courts of law understand it in the legal sense; the genus of it is expressed by the words *non compos*, or *insanæ mentis*; and this agrees with the old idea in the books, that a man shall not stultify himself, and the reason given (though it does not hold now as it has been heretofore laid down), shows what the law considers as *non compos*. . . . The statutes of fines and limitations all adopt the words '*non compos, non sanæ mentis*,' as technical words, to express the deprivation of reason, agreeably to the wisdom of the law which aims at certainty. These words are legitimated, and they are now the only legitimate words to describe the incapacity." At page 551, in a different proceeding between the same parties, Lord Chancellor Lifford says, further, "The next point is, that he was an idiot or natural fool, and of unsound mind through a radical defect; or if not so, yet so defective through weakness of understanding, as to be incapable of doing any legal act to alter the estate." Having disposed of the question of idiocy and unsound mind, he proceeds to consider the ground

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that he was so far of unsound mind as to be incapable of managing his affairs, and consequently of doing any legal act. He says, "The true answer has been given, and, indeed, the candor of the plaintiffs' counsel has admitted, that there is no such thing as equitable incapacity distinct from legal; were it otherwise, the greatest mischief would arise; there are no scales to weigh the human understanding; the wisdom of the law is human wisdom ripened by ages, and the law draws lines, which, though in a moral sense imperfect, as all human institutions are, yet they are better than none at all; infinitely better than if the judge was to determine in every case; were it so, the case would depend on the judge's affections, his patience, his discretion, and nothing but confusion would arise in society. I, therefore, must speak to my own rule, of *compos* or *non compos*, as defined by Littleton; I must hold him capable." In the same case (p. 527), Lord Chancellor Bowes says, "The dominion over his own property is the blessing and happiness of a man living in free societies; that the law allows alienation by people extremely weak, who are not capable of reasoning but on a particular thing happening to be then before them; that in the case of wills, a man is making a will *in extremis*, and is as incapable of reading two skins of parchment, as a Hebrew Bible; but if he knows that the consequence of that act will be a disposing to one he likes, and from one he does not like, that will could not be overturned, and yet there was the greatest incapacity."

We submit, therefore, that the policy and reason of *Stewart v. Lispenard* are sustained by the authorities cited; that it is in accordance with the course of decision in this State, and ought upon no ground to be disturbed.

The doctrine of the case was adopted in *Potts v. House* (6 Geo., 324), and still more recently in *Morris v. Stokes* (21 Id., 552).

Some observations occurring in the English books, and which are constantly invoked on questions of this sort, may be noticed. *Winchester's Case* (6 Coke, 23 a), was an appli-

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cation for a prohibition to the ecclesiastical court against proving a will, on the suggestion that the testator was not of sane memory, and that the will related to real as well as personal estate, and that the heir's chances of success before a jury might be prejudiced by an adverse determination in the ecclesiastical court. The prohibition was granted. So far as the adjudication went, it has been long since overruled. The statement as to testamentary capacity which it contains, is a mere addendum to the statement of the case, and no part of what took place in court. It rests for its authority on having been written by Lord Coke, who was of counsel to obtain the prohibition, as he mentions in deciding *Egerton v. Egerton* (2 *Bulstrode*, 219). It seems probably to have been taken from what was said in *Combes' Case* (*Moore*, 759), decided in 3 *Jac.*, 1, shortly before 6 *Coke* was published.

Combes' Case seems to have been a mixed criminal and civil proceeding in the Star Chamber. It is called a bill of forgery against Combes and others for the supposed forgery of a will of Richard Brokenbury, lately one of the queen's ushers. It was held that to omit a thing, or legacy out of a will which is directed to be inserted, is not forgery; but if it is directed to give land to one for life, remainder to another in fee, and the estate for life be omitted, whereby the remainder will take effect presently, that is forgery. They also held that if one write a will without direction, and bring it to the devisor, and he allows it, it is good; but if he were then of *non sane* memory, the will is void, and yet is not a forgery. And so it was adjudged; and Combes, who was charged with the forgery, was cleared of that. But the filling up the blanks by him when Brokenbury was not of sane memory, was thought to be a misdemeanor, if he knew him to be of *non sane* memory—but the misdemeanor was pardoned. Then follows the passage cited, which, from the expressions used, would seem to relate to a man at his last gasp, and almost incapable of receiving impressions through his senses, and it may be that one in that condition may not have had any reason left. The citation from *Herbert v. Lowins* (1 *Rep.*

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in *Ch.*, 12, 18, or 24, 25), would more accurately have represented the case if it had been carried a little further. The court did not proceed to give its decision on the principle quoted. It says, "Although it hath been often taken," &c., "yet this court would not pronounce that the said Bland was not of a disposing memory at the making said will and conveyances; but this court was fully satisfied and did pronounce that the said Bland was a very weak man, and apt to be circumvented, and that, therefore, although the said deeds and will were not void in law, as not being made by a man of *non sane* memory, yet so much thereof as was drawn from him by practice and circumvention, ought to be made void in equity." In each of these cases it is apparent that actual imposition as well as diminished intellect existed, and the expressions used are to be interpreted in reference to the joint effect of both facts.

As to *Mountain v. Bennett* (1 *Cox*, 353), it is of no great consequence that EYRE, Ch. B., in charging the jury is reported to have used the terms "a momentous instance" with reference to the act of making the will there in controversy, nor as the will was sustained by the jury was it ever necessary to consider whether the chief baron did not err against the party claiming under the will. In *Greenwood v. Greenwood* (3 *Curt.*, App. 30), what Lord Kenyon is reported to have said as to mind competent to dispose of property by will, was quite beside the question in the cause, which turned on the effect of a delusion in respect to the conduct of the brother of the testator. *Ball v. Mannin* (3 *Bligh*, N. S., 1) is the same case mentioned in Senator Verplanck's opinion as *Bell v. Martin* (1 *Dow & Clark*, N. S., 386), and which is there commented on by him.

In conclusion, as to this branch of the subject, we say, that when once the mind has fairly embraced the ideas, the whole aim and purpose of the law is to give effect to the owner's dominion over property; that it has no choice or preference as to the person to whom at death it shall be devolved; that it fixes a course of devolution in accordance

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with the usual feelings and affections of men to take effect when the owner expresses no different wish, not to give expectant heirs an interest before their day, but only because property must pass to some one; it seems impossible that any thing more should be required in respect to mental capacity, than that there should exist so much mind as can entertain a wish in respect to the disposition to be made. If such a wish be entertained and expressed in the forms and with the ceremonies required by law, and there be no fraud, nor coercion, surely no legal obstacle can make it ineffectual.

III. From the same general considerations favoring the largest dominion over property by its owner, it would seem to follow, that when an act of disposition appears to have been done by the owner it should be intended that the requisite mental capacity was not lacking, and that the burden should be thrown upon those who deny the owner's mental capacity to establish the fact of incapacity. It is not for the owner to make out his right of disposition by showing his mental capacity. The right of disposition is incident to the ownership, and it is for those who deny the existence of the right, to establish the ground of fact on which the denial rests. Such clearly is the law of New York. In *Jackson v. Van Dusen* (5 Johns., 159), VAN NESS, J., in giving the opinion of the court, says: "In all cases where the act of a party is sought to be avoided, on the ground of his mental imbecility, the proof of the fact lies upon him who alleges it, and, until the contrary appears, sanity is to be presumed. In *Jackson v. King* (4 Cow., 216), WOODWORTH, J., lays down the rule in the same terms. In *Osterhout v. Shoemaker* (3 Den., 37), the charge of the judge, which was sustained by the court, imposed the burden of making out the alleged want of mental capacity on the party desiring to avail himself of it. *Swinburne on Wills* (vol. 1, p. 119), which is mainly made up of extracts from the text of the civil law, and from commentators upon it, says: "Every person is presumed to be of perfect mind and memory, unless the contrary be proved. And, therefore, if any person go about to impugn or over-

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throw the testament by reason of insanity of mind, or want of memory, he must prove that impediment." So in 2 *Phillips' Evidence* (293) it is said: "If a party impeach the validity of a will on account of a supposed incapacity of mind in the testator, from whatever cause it may proceed, whether from a natural decay of intellect, from derangement or partial insanity, it will be incumbent upon him to establish such incapacity by the clearest and most satisfactory evidence."

In the courts of other States considerable difference of opinion has occurred upon this subject. The principal cases which do not agree with the law of New York are collected in the argument of the contestants. Some of them seem to proceed upon what the courts have regarded as the special requirements of their own statute law, while in all of them is disclosed what we conceive to be a fundamental and fatal error in the consideration of the subject. They treat the question as if the maker of a will was in the position of one who claims under a statute power, by whom every step must be affirmatively shown, or of one who is to plead performance of conditions precedent, in order to entitle himself to demand some consequent duty. We, on the other hand, suppose that the qualifications imposed by the statutes are not to be looked upon as conditions precedent to the existence of a right to make wills. That the general right and power is to make wills as it is to do other acts of disposition; that the limitations on that right are, in their own nature, exceptions out of the general rule; and that, so far as defect of mental capacity or intellectual disorder are concerned, those exceptions are such as the unwritten law, without any statutory declaration, would have indicated. That it is therefore eminently fit that the burden of proving the exceptional case should rest on him who asserts it to exist, and to have taken away from the particular individual, the common and general incident to ownership, the power of disposition by will.

In addition to the cases in New York, many others may be cited: *Stevens v. Van Cleve* (4 Wash. Cir. C., 262); *Hoge v. Fisher* (1 Pet. Cir. C., 163); *Harrison v. Rowan* (3 Wash.

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Cir. C., 582); *Zimmerman v. Zimmerman* (23 *Penn.*, 375); *Pettes v. Bingham* (10 *N. H.*, 515); and *Sloan v. Maxwell* (2 *Green Ch.*, 580).

Assuming, then, that a man is not by want of capacity disabled to make *any* will, the statutes expressly point out what shall be the authentication which such an instrument must receive to make it effectual. When those requirements have been complied with, as no other evidence could supply the absence of the statutory proofs, so nothing further in addition or corroboration can be required. Such a will may be defeated if it be shown to be the product of fraud or coercion, and into that question the effect of impaired or naturally feeble intellect will enter; for it is obvious that such an intellect will be more subject than a strong one to be deluded by fraud or overcome by force. But these are grounds to be made out by the party alleging their existence. (*Coldclough v. Boyse*, 6 *House of Lords Cases*, 45; *Barry v. Butlin*, 1 *Curtis*, 637.) The influence to vitiate an act must amount to force and coercion, destroying free agency; it must not be the influence of affection and attachment; it must not be the mere desire of gratifying the wishes of another; for that would be a very strong ground in support of a testamentary act; further, there must be proof that the act was obtained by this coercion; by importunity which could not be resisted; that it was done merely for the sake of peace; so that the motive was tantamount to force and fear. (1 *Wms. on Ex'rs*, 44). These are the principles and tests which all the cases put forth as the criteria of undue influence, when alleged against those standing in indifferent relations to the testator.

Certainly, in the relation of man and wife, where it has not commenced after the invasion of disease, where it was entered upon on the usual motives, and under usual circumstances, the law does not require that the wife shall not influence the husband, or subject her conduct to more stringent rules, or more uncharitable suspicions than those which are applied to others. On this point the law is clearly stated in *Stuls v. Schaeffe* (18 *Eng. Law & E.*, 579, 597).

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THE SURREGATE.—The following instruments in writing were propounded for probate as the last will and testament of Henry Parish, deceased :

In the name of God, Amen! I, Henry Parish, of the city of New York, merchant, do make, publish, and declare the following as my last will and testament :

First. I give, devise, and bequeath unto my beloved wife, Susan Maria, the house and lease of the lot now known as No. 49 (forty-nine) Barclay-street, in the city of New York, where I now reside, (called lot No. 200 in the lease from Columbia College to me, dated the first day of May, one thousand eight hundred and thirty,) with all my right and interest in, to, and under the same; and also (after the decease of my friend and relative, Mrs. Catharine Payne) the house and lease of the lot now known as No. 88 (eighty-eight) Chambers-street, in said city of New York, (in the lease from St. Peter's Church called lot No. 429 of the Church farm, assigned to me by Joseph Sands by assignment, dated the second day of April, one thousand eight hundred and thirty one,) with all my right and interest in, to, and under the same. I also give, devise, and bequeath unto my said wife, in fee, the following real estate situated in the city of New York, to wit: The store and lot now known as No. 54 (fifty-four) Pine-street, (which was conveyed to me by George Suckley and Daniel Oakley by deed dated the first day of May, one thousand eight hundred and twenty-six;) and my equal undivided half of the lot and store now known as No. 160 (one hundred and sixty) Pearl-street, the other half of which is owned by Joseph Kernochan, a correct map of which said lot, No. 160 Pearl-street, and also of lot No. 162 Pearl-street, and lots Nos. 124 and 126 Water-street, hereinafter mentioned and devised, made by Joseph F. Bridges, City Surveyor, dated the tenth day of September, 1842, and certified to be correct by Joseph Kernochan and myself, is now on record in the office of the Register of the city and county of New York. I also give, devise, and bequeath unto

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my said wife in fee, the following real estate situated in the city of New Orleans, and which was allotted to me or fell to my share, on a division of a part of the real estate belonging to my late firm of Gasquet, Parish & Co., of New Orleans, which division was made in March last (1842); to wit: A store and lot of ground fronting on Tchapitoulas-street, next to the corner of Lafayette-street, and adjoining ground now or late of T. Banks, being about thirty-two feet and three inches wide in front by ninety-two feet and three inches and one quarter of an inch deep; a store and lot of ground situated at the corner of Tchapitoulas and Lafayette streets, fronting on Tchapitoulas-street, being about twenty-one feet and three inches and three quarters of an inch wide in front, and ninety feet and six inches and one quarter of an inch deep on Lafayette-street; a lot of ground fronting on Camp-street, being about twenty-five feet and nine inches wide in front by one hundred and fifty feet deep; and three lots of ground fronting on St. Joseph-street, being each about twenty feet and two inches wide in front by one hundred feet deep.

Second. I also give, devise, and bequeath unto my said wife all my household furniture, including all my silver and plate, wines, and library of books; all horses and carriages that I may own at the time of my decease; and also my pew (No. 98) in Grace Church in the city of New York.

Third. I give, devise, and bequeath unto my executors hereinafter named, and to the survivors and survivor of them, or to such of them as may qualify and act as such, the sum of two hundred thousand dollars of my personal estate, in trust, to invest or keep invested that amount in bonds and mortgages on unincumbered real estate, or in the stock of the city of New York, or of the State of New York, or of the United States, and to pay or apply the interest or income thereof to the sole and separate use of my said wife during her natural life; and upon her decease to pay over the said sum of two hundred thousand dollars as my said wife shall by her last will and testament, or writing in the nature of a last will and testament, direct and appoint.

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Fourth. I give, devise, and bequeath unto my nephew and namesake, Henry Parish, son of my brother Daniel Parish, in fee, my undivided one-half of the lot and store now known as No. 162 (one hundred and sixty-two) Pearl-street in the city of New York, the other half of which is owned by Joseph Kernochan; and also my undivided one-third part of the store and lot, now known as No. 172 (one hundred and seventy-two) Pearl-street corner of Pine-street, in the said city of New York, the remaining two-thirds of which are owned by the said Joseph Kernochan and Daniel Parish.

Fifth. I give, devise, and bequeath unto my namesake, Henry Parish Kernochan, son of my friend Joseph Kernochan, in fee, my undivided half of the two lots and stores now known as Nos. 124 (one hundred and twenty-four) and 126 (one hundred and twenty-six) Water-street in the city of New York, the other half of which is owned by the said Joseph Kernochan.

Sixth. I give, devise, and bequeath unto my friend, Peter Conrey of New Orleans, all my part or share of, or interest in the undivided real estate situated in the State of Louisiana belonging to my said late firm of Gasquet, Parish & Co., in trust to convey the same, or to pay over the proceeds thereof, to my namesake, Henry Parish Conrey, son of the said Peter Conrey; a part of which undivided real estate is situated in Jefferson parish in the said State of Louisiana, and the balance (about three thousand two hundred acres of land) in Oachita in said State. It being my wish that the liquidating partners of my said late firm should be allowed, if they should think best, to sell said undivided real estate and pay over the proceeds to the said Peter Conrey, and in case the said real estate should be divided, it is my wish that the portion allotted or set apart to me should be conveyed to my said namesake; my desire being not by this devise or bequest to embarrass my late partners in the liquidation or settlement of the estate of my said late firm.

Seventh. I give, devise, and bequeath unto my friend and relation, Mrs. Catharine Payne of the city of New York, the

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house and lease of lot now known as No. 88 (eighty-eight) Chambers-street in the city of New York, now occupied by her, (which after her death I have hereinbefore given to my wife,) to have and hold the same during her natural life. I also give, devise, and bequeath unto the said Catharine Payne an annuity of one thousand dollars to be paid to her half-yearly during her natural life; the first five hundred dollars to be paid to her at the expiration of six months after my decease, and the like sum of five hundred dollars to be paid to her every six months thereafter during her life; the premium of insurance, ground-rent, and taxes of said house and lot are, during the lifetime of said Catharine Payne, to be paid by my executors.

Eighth. I give, devise, and bequeath unto my executors hereinafter named, and to the survivors and survivor of them, or to such of them as may qualify and act as such, the sum of twenty thousand dollars of my personal estate, in trust, to invest or keep invested that amount in bonds and mortgages on unincumbered real-estate, or in stock of the city of New York or of the State of New York or of the United States, and to pay or apply the interest or income thereof to the sole and separate use of my sister, Ann Parish, during her natural life; and upon her decease to pay over the said sum of twenty thousand dollars as my said sister shall by her last will and testament, or writing in the nature of a last will and testament, direct and appoint.

Ninth. I give, devise, and bequeath unto my executors hereinafter named, and to the survivors and survivor of them, or to such of them as may qualify and act, a further sum of twenty thousand dollars, in trust, to invest or keep invested that amount in bonds and mortgages on unincumbered real-estate, or in the stock of the city of New York or of the State of New York or of the United States, and to pay or apply the interest and income thereof to the sole and separate use of my sister, Martha Sherman, wife of Allen M. Sherman, during her natural life, and upon her decease to pay over the said sum of twenty thousand dollars to her lawful issue, the

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issue of any deceased child to take the share of the deceased parent; and in case my said sister shall die without leaving any lawful issue, then, in trust, to pay over the said sum of twenty thousand dollars as my said sister may by last will and testament, or writing in the nature of a last will and testament, direct and appoint.

Tenth. I give, devise, and bequeath unto each of my executors hereinafter named, to wit, Daniel Parish, Joseph Kernochan, Joseph Delafield, Henry Delafield, and William Delafield, or to each of them who shall be living at the time of my decease, the sum of ten thousand dollars, to be received or retained by them in lieu of all commissions or compensation as such executors, and which ten thousand dollars each is to receive, whether he qualifies and acts as such executor or not.

Eleventh. The provisions herein made for my wife are intended by me and are to be accepted by her in lieu of her dower in my estate.

Twelfth. After the expiration of two years from my decease, and after all the foregoing provisions of my will shall have been fully provided for and complied with, or my executors shall be satisfied that they can fully comply with said provisions and also with the provisions hereinafter made, if the residue of my estate shall amount to, or exceed, the sum of two hundred and ten thousand dollars, then I give, devise, and bequeath the said further sum of two hundred and ten thousand dollars to my executors hereinafter named, and the survivors and survivor of them, or to such of them as shall qualify and act, in trust, to pay to my nephews, John H. Parish, and Daniel Parish, junior, (sons of my brother Daniel Parish,) and Jacob Parish and Thomas Parish, (sons of my brother James Parish,) respectively and to each of them who shall be then twenty-one years of age, the sum of ten thousand dollars thereof; and if either of my said nephews shall be then under twenty-one years of age, then in trust to pay or apply the interest or income of the sum of ten thousand dollars to his use until he comes of age; and as my said

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nephews shall respectively attain the age of twenty-one years, then to pay over to each of them the said sum of ten thousand dollars; and upon the further trust to pay or apply to the sole and separate use of each of my nieces, Sarah E. Parish, Mary P. Parish, Anna Parish, Susan D. Parish, and Margaret K. Parish, (daughters of my brother Daniel Parish,) and Mary Louisa Parish, Henrietta F. Parish, Elizabeth Parish, and Jane Ann Parish, (daughters of my brother James Parish,) the interest and income of the like sum of ten thousand dollars thereof, during their natural lives; and upon the further trust, to pay or apply to the sole and separate use, respectively, of my cousin Mrs. Margaret E. Kernochan, wife of Joseph Kernochan, of Mrs. Julia Delafield, wife of Joseph Delafield, of Mrs. Harriet Delafield, wife of John Delafield, of Mrs. Eliza Delafield, wife of Rufus K. Delafield, of my cousin Mrs. Mary P. Abeel, wife of James Abeel, and of Miss Emma Delafield, and of each of them during their natural lives, the interest or income of a like sum of ten thousand dollars; and upon the further trust to pay to each of my friends, Doctor Edward Delafield and Major Richard Delafield, the sum of ten thousand dollars thereof. And in case the said residue of my estate at or after the expiration of two years from my decease, and after fully complying with the previous provisions of my will, shall not amount to the said sum of two hundred and ten thousand dollars, then I give, devise, and bequeath the rest, residue, and remainder of my estate to my said executors, and to the survivors and survivor of them, or to such of them as shall qualify and act, in trust, to divide and appropriate, and pay or apply the same, or the interest or income thereof, in the manner, and to or for the use of the persons above, in this the twelfth clause of my will, specified, so that each of the persons named as devisees or legatees in this clause of my will shall receive, if a male, one equal twenty-first part of such rest, residue, and remainder of my estate; or, if a female, the interest and income of the like twenty-first part of such rest, residue, and remainder of my estate. And in case of the death of either

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of the persons named as devisees or legatees in this clause of my will, leaving lawful issue, such issue is to receive the principal sum herein directed to be paid to or held for such devisees or legatees; and in case of the death of either of said persons named as devisees or legatees in this clause without lawful issue, then such principal sum, in each case, is to be paid over as the deceased devisee or legatee shall by last will and testament, or writing in the nature of a last will and testament, direct and appoint. It being my intention that the bequests or legacies, in this clause of my will, made or given to my said nephews, should become vested in them when they respectively attain the age of twenty-one years, and not before. Interest is to be paid or allowed upon all of the bequests or legacies, contained in this clause of my will, from and after the expiration of two years from my decease, but not sooner; and my executors shall not be required by any of the devisees or legatees named in this clause to pay any of the said bequests or legacies, or any part thereof, until such reasonable time after the expiration of said two years from my decease as my said executors shall see fit, being governed by the condition of my estate; but my executors are authorized to pay the said bequests or legacies or any part thereof, as soon after, but not before, the expiration of the said two years from my decease, as they shall deem proper and expedient.

Thirteenth. I give, devise, and bequeath all the rest, residue, and remainder of my estate, of every nature and description, (after all the devises, bequests, or legacies, hereinbefore specified, shall have been fully paid or provided for, and after the preceding provisions of my will shall have in all respects been fully complied with,) to my brothers, Daniel Parish and James Parish, equally, share and share alike, and in case of the decease of either, his share is to go to his lawful issue.

Fourteenth. It is my will and intention that all the property, real and personal, that I may own or possess at the time of my decease shall pass under this will, whether the same be now owned or possessed by me, or may be hereafter

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acquired by purchase, descent, distribution, or otherwise. And I hereby authorize my said executors, and the survivors and survivor of them, or such of them as shall qualify and act, to sell and convey any real estate that I may own or possess at the time of my decease and not hereinbefore devised or disposed of.

Fifteenth. And inasmuch as the devises and bequests herein contained of real estate, situated in the State of Louisiana, may prove insufficient to vest the same as I have hereinbefore provided, it is my will that my heirs-at-law, by whom the said real estate would be inherited in case it should not pass under this will, do release or convey the same in conformity with the devises thereof contained in this will; and the devises, bequests, and legacies contained in this will to or for the benefit of my said heirs-at-law, are made upon the express condition that my said heirs shall so release or convey the said real estate in Louisiana in case it should become necessary or proper, in order to carry my will in respect to said real estate into effect. And in case my said heirs-at-law should not so release or convey said real estate in Louisiana, I revoke the provisions herein made for them, and I give, devise, and bequeath the sums and property hereinbefore devised, bequeathed, or given to them, or to my executors for their benefit, to my wife, except the sum of five thousand dollars which I give to my said namesake, Henry Parish Conrey, in lieu and stead of the provision hereinbefore made for him.

Sixteenth. I nominate and appoint my brother, Daniel Parish, and my friends, Joseph Kernochan and Joseph Delafield, to be three of the executors of and trustees under this my last will and testament; and in order to give as little trouble as possible to my executors, I desire the said three to first qualify and act as such; and I also nominate and appoint my friends, Henry Delafield and William Delafield, to be two additional executors and trustees, and I desire them to qualify and act as such executors and trustees, whenever any two of the three first-named executors and trustees shall

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be deceased or shall become for any reason unable or incompetent to perform the duties of such executors and trustees.

HENRY PARISH. [L. S.]

Signed, sealed, published, and declared by the testator, as, and for, his last will and testament, in our presence, who, at his request and in his presence, and in the presence of each other, have hereunto subscribed our names and places of residence as witnesses thereto, at the city of New York, this twentieth day of September, one thousand eight hundred and forty-two.

CHARLES G. HAVENS,

9 Nassau-street, New York.

WM. ED. SAUNDERS,

116 Wooster-street, New York.

I, Henry Parish, by way of codicil to my last will, give to my dear wife, in fee simple, the following lands: namely, the lands on which my dwelling-house, conservatory, stable, and the adjoining dwelling on Broadway, are erected, situate at the corner of Broadway and Seventeenth-street on Union Square, and the rear lot on Eighteenth-street. Also the lands and building owned by me in Wall-street, now known as number 67 Wall-street.

In witness whereof I have subscribed these presents as a codicil to my will, this twenty-ninth day of August in the year of our Lord, one thousand eight hundred and forty-nine.

HENRY X PARISH.

Signed by me by direction of H. Parish, DAN. LORD.

HENRY PARISH, his X mark.

Subscribed by Henry Parish as a codicil to his will, and declared by him as such in our presence attesting the same at his request. The contents having been read to and understood by him.

E. HOLBROOK, Northeast corner Fourth Avenue and Eighteenth-street.

DANIEL D. LORD, Nineteenth-street, New York City.

DANIEL LORD, 26 Beach-street, New York.

On this seventeenth day of December, 1849, Henry Parish again subscribed the above in our presence, it having been

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again read to him; and he declared that he had signed it as a codicil to his will.

DANIEL LORD, 26 Beach-street, New York.

E. HOLBROOK, Northeast corner Fourth Avenue and Eighteenth-street.

By this codicil to my will, executed September 20, A. D. 1842, I, Henry Parish, do hereby devise, bequeath, and dispose as follows: *First.* Unto my dear wife, Susan Maria Parish, her heirs and assigns forever, I give my land and dwelling-house on Union Square (known as number 26 East Seventeenth-street) in which we live, and the land in the rear to Eighteenth-street, on which the stable is built; and also the lot on the corner of Broadway, on which the conservatory is built, and the adjoining lot on the easterly side of Broadway, known as number 860 Broadway, now occupied by Mrs. Catharine Payne, the said lands all lying together; also I give to her, in fee simple my land on Wall-street, with the building thereon, known as number 67 Wall-street; all in the city of New York.

Second. Unto my wife, Susan Maria, I also give the stocks, bonds and securities following, namely: One hundred and fifty-three shares of the stock of the Bank of Commerce; two hundred shares of the stock of the Metropolitan Bank; twenty-five shares of the New York and California Steamship Company stock; fifty shares of the Panama Railroad Company stock, and two thousand and fifty-eight shares of the stock of the Phoenix Bank; a bond and mortgage of Nelson Shook, and a bond and mortgage of Philip Keiley; which stocks and mortgages by my direction have been put into her name. Also I give her twenty bonds of the Hudson River Railroad Company; twenty-five (income) bonds of the Erie Railroad Company; twenty (mortgage) bonds of the same company; twenty-five bonds of the Watertown and Rome Railroad Company; twenty-seven bonds of the New York and Harlem Railroad Company; twenty-five bonds of the New York and New Haven Railroad Company; twenty bonds of the Pennsylvania Coal Company; ten other bonds

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of the New York and Harlem Railroad Company; ten bonds of the Cincinnati Gas-light and Coke Company; fourteen bonds (\$1000 each) of the New Haven and New London Railroad Company; twelve bonds (\$500 each) of the same Company; seven bonds of the Northern Indiana Railroad Company; eight bonds of the Covington and Lexington Railroad Company; eight bonds of the Michigan Southern Railroad Company; which stocks and bonds at par, and without interest, amount to three hundred and forty-nine thousand four hundred and sixty dollars. Also I give her my scrip in the Panama Railroad Company, and in the Manhattan Gas-light Company.

If any of the stocks or bonds above given should be sold or paid off in my lifetime, the same shall be made good to her by an equivalent of other stocks held by me; or if my estate have no stocks for that purpose, in money.

The gifts in this codicil to my wife, are in addition to what is given her in my will: some of the lands given to her in the said will have been sold.

Third. I bequeath to the American Bible Society ten thousand dollars; to the Orphan Asylum Society, in the city of New York, I bequeath ten thousand dollars; to St. Luke's Hospital, in the city of New-York, I give ten thousand dollars; to the New York Eye Infirmary I bequeath twenty thousand dollars; all payable two years after my decease.

Fourth. I revoke the appointment of Daniel Parish to be one of my executors (in the seventeenth clause of my will) and the gift of ten thousand dollars to him as executor in the tenth clause thereof.

In witness whereof I have subscribed this codicil, as a codicil to my last will and testament, and have published the same as such, in presence of the witnesses subscribing with me, this fifteenth day of September, in the year of our Lord one thousand eight hundred and fifty-three.

HENRY PARISH, his X mark.

Subscribed by Henry Parish (whose name was written by

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the undersigned, Dan. Lord) in our presence; and the codicil being read to him in our presence, he before us declared that he had subscribed the same as a codicil to his will; and at his request we attest the same as witnesses. Sept. 15th, 1853.

CH. AUGT. DAVIS, No. 1 University Place, New York.

DANIEL LORD, 34 West Seventeenth-street, New York.

By this further codicil to my will (dated September 20th, 1842), I, Henry Parish, do devise, bequeath, and direct in manner following, namely: I give, devise, and bequeath to my wife, Susan Maria Parish, all the rest, residue, and remainder of my estate, real and personal, as it shall be at my decease (after all the devises and legacies in my will and codicils which shall actually take effect shall be provided for) to have and to hold, to her, her heirs, executors, administrators and assigns forever; and in case she shall survive me, I revoke the thirteenth article of my above-written will. In witness whereof, I have subscribed this codicil subjoined to my said will, this fifteenth day of June, in the year of our Lord one thousand eight hundred and fifty-four.

HENRY PARISH, his X mark.

Subscribed as a codicil to his will by Mr. Henry Parish in our presence, his name having been, by his direction, written by Daniel Lord subscribing witness; and the codicil having been read to him, he declared that he had subscribed it as a codicil to his will, and requested us to attest the same. 1854, June 15th.

DANIEL LORD, 34 West Seventeenth-street,
New York.

JOHN WARD, 8 Bond-street, New York.

The probate of all these papers was resisted by Mrs. Sherman and Miss Anne Parish, the sisters of the decedent; and the codicils were contested by Daniel Parish and James Parish, the brothers of the decedent, who are named as residuary devisees and legatees in the thirteenth clause of the will. At the date of the will, September 20th, 1842, the decedent was in good health, and in the free unabated possession and enjoyment of his mental faculties. On the 19th day

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of July, 1849, he was seized with paralysis; the first codicil was made August 29th, 1849; the second, September 15th, 1853; and the third, June 15th, 1854. Mr. Parish departed this life March 2d, 1856.

Rarely, if ever, in the annals of justice has a case been presented involving at its trial such a close and rigid investigation of every fact having a material bearing, however remote, upon the issue; exhibiting scientific examination and criticism of the highest order, upon physical and rational phenomena; developing in its progress questions of profound interest to the physiologist and to the jurist; and finally discussed and illustrated with forensic power and brilliancy worthy of admiration. To pass judgment in such a cause, *tantas componere lites*, is a task of no ordinary labor and gravity. It has, however, fallen to my lot; and having, as it were after a long and toilsome journey, arrived at a conclusion, it remains for me to indicate the grounds upon which it is based.

Before stating the reasons of my decision, I feel an obligation, and certainly find it a pleasure, to say that the view of the case, which is in my judgment controlling, has rendered it unnecessary to consider matters of domestic and family relation with any special minuteness. I have seen no reason for impeaching the motives of any of the parties interested, or for attributing acts usually betokening affection, to unworthy and sinister intentions. The controversy, I am satisfied, depends upon the application of certain rules of law to the evidence concerning the condition of Mr. Parish after his attack, and without any reference to the question of actual undue influence or fraudulent procurement, which is generally involved in cases of this character. There were three interests represented before me—one in favor of intestacy, one in support of the will alone, and one in support both of will and codicils.

I. On behalf of the sisters of the decedent, it was contended that the will of September, 1842, was totally revoked, "First, because," to employ the language of this allegation,

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"it was the intention of the testator that it should be revoked; next, that there was an implied revocation by law, of the will, growing out of the subsequent action of the decedent, and the change in his circumstances; and third, that so much of the will was thus impliedly revoked, even independent of intention, that the whole must fall to the ground;" or, as stated in other words, "that the will was revoked *in toto* partly because of the intention of the testator; partly by implied revocation in law; and chiefly because so much of it is thus destroyed that it is impossible, according to the principles of law, that every part could be carried into effect, without violating every intention that the testator could have had."

The first position in this argument is grounded on "the intention of the testator," to revoke, and it involves the assertion that after the paralytic seizure in July, 1849, he possessed sufficient capacity to revoke his will, and to express his intentions in that respect. But if he could revoke his will, why could he not make a codicil, and if so, there was no intestacy. This difficulty, therefore, necessitates the further proposition that the decedent had, after his attack, a degree of mental power adequate to revoke, but inadequate to create—potential to annul the will, but impotential to establish the codicils. If there be such a stage between the rational and the imbecile as this, it is difficult to define or characterize it abstractly by marks or tokens, and equally difficult to demonstrate it in the living subject. But to test this question in its strongest position, let us suppose the codicils inoperative, and that the decedent had continued in the full vigor of his intellect, and the unimpeded power of expressing his ideas from the execution of the will in 1842 to the very day of his death, would there have been a valid revocation of the will? It will readily be admitted that a mere intention to revoke never effectuates an express revocation. The most satisfactory evidence that the testator had repeatedly and explicitly declared that it was his deliberate design to annul or destroy his will, would not authorize the

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court to reject the instrument. A written statement to that effect, in the testator's own handwriting, would not be a valid revocation unless celebrated according to the forms prescribed by the statute. A legal act must be done *animo et facto*. There must concur the intention and the act. Intention or mere purpose, to become legally operative, must be expressed in a legal way. To design to do, and to do, are not the same. The act implies and embraces the intention, but the mere naked intention does not include and comprise the act.

But passing from express to implied revocations, we find the doctrine of implied revocation placed at times upon a presumed intention to revoke, derived from certain acts and circumstances; but apart from such acts and circumstances no consideration has ever been given to mere intention. At other times the doctrine of implied revocation has been placed upon the ground of a tacit condition annexed to the will at the moment of celebration, that it should not take effect under certain circumstances. But however the courts may have differed as to the speculative reasoning upon which the legal rule was founded, there is no difficulty in ascertaining what circumstances have been adjudged sufficient to constitute an implied revocation; and having reached and defined that standard, we shall have nothing more to do than to apply the test to the case in hand.

At common law there were two classes of implied revocations: first, such as were declared by the law in view of a change in the testator's circumstances, especially his family relations, since the execution of the will, and which effected a total revocation of the will and all its dispositions. This class was received in consideration by the probate courts. The doctrine on this point was derived from the Roman jurisprudence, and adopted with some modification. The civil law evinced a tender regard for the protection of children from the carelessness, caprice, or injustice of parents, and for this purpose it was required in order to exclude a son from the inheritance, that he should be expressly disin-

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herited. (*Inst.*, lib. 2, tit. 13.) This privilege was ultimately extended by Justinian to all the children, female as well as male. (*Id.*, § 5.) The birth of offspring operated therefore to revoke an antecedent will, and even the adoption of a child effected the same result. (*Id.*, lib. 17, § 1.) The principle involved in these laws was so far received by the probate courts of England, which proceeded generally according to the course of the civil law, that marriage and the birth of issue were held to work an implied revocation of a previous will. The rule spread from the spiritual to the common-law courts, and after some hesitation was finally acknowledged as applicable to devises of real estate. In this State it was sanctioned after full deliberation, by that profound and enlightened jurist Chancellor Kent, and was subsequently incorporated in the Revised Statutes. There are cases in England and in this State, where the birth of children (without a subsequent marriage), in conjunction with other alterations in the testator's circumstances, has been held sufficient to establish an implied revocation of a previous will. But I am not aware of any decision in the whole range of the law of the probate courts, declaring a will revoked and refusing sentence of probate, on account of alteration in the testator's circumstances, where that alteration did not include as one of its essential ingredients either marriage or the birth of issue after the will was made. Without these elements, or one of them, no change of circumstances, however great, can effectuate an implied revocation at common law, so as to debar probate and annul the instrument.

The second class of implied revocations at common law, were revocations by alienation or such acts of the testator in regard to his property, as indicated an intention to exempt the property dealt with or attempted to be dealt with, from the dominion of the will. These revocations sprang from dealing with the property which was the subject of testamentary gift, and their extent was consequently commensurate with the dealing. So far as relates to particular devises or bequests which become inoperative before the testator's

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death, by reason of the previous decease of donees, or the disposition by the testator in his lifetime of the property devised or bequeathed, these are circumstances which never work a revocation of the will as a valid testamentary instrument *per se*. They regard the effect of the will in giving title, not its proof as a subsisting will. They relate to an interruption of the devise, because there is no devisee to take, or nothing to be taken. Even in the case of an attempt to alienate, from which the courts presumed an intention to revoke, the revocation was limited to the specific property sought to be alienated, and if any other property remained on which the will could act, there was only a partial revocation. This class of revocations therefore never came within the purview of the probate courts. They relate to the subject-matter of the will, and not to the will itself, and their consideration has been limited to the courts of construction.

Where I guided then by the rule of the common law, I should be compelled to decide that the will of Mr. Parish made in 1842, was not revoked by any change of circumstances, there being no subsequent marriage or birth of issue, and no such acts in regard to his property as would in any court exempt his entire estate from the dominion of the will.

But the whole subject has been definitely determined by the statutes of this State. In the Statute of Wills (34 Henry VIII., c. 5) there was no provision respecting revocations, and the courts continued to allow parol proof, as before, of revocation, until by the Statute of Frauds (29 Charles II., c. 5) it was prohibited. A long struggle ensued, to escape from a rigid application of the statute, and it became so evident that an exact compliance with its provisions, occasionally effected great injustice and hardship, that the judges were led to adopt the rule that implied revocations were not within its purview. As in all cases of such expedients, the remedy was worse than the disease. In the effort to overcome the inconvenience of a literal compliance with the law, in particular instances presenting strong inducements for equitable interference, the tribunals opened a wide field for

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the exercise of judicial discretion and interposition, until evils were developed far exceeding those sought to be averted; and an exception to the statute introduced in the first instance for the purpose of carrying out a presumed intention of the testator, was often applied so as to thwart and frustrate his real intention. No portion of the history of the law illustrates more pertinently the injudicious policy of an attempt by the courts of justice to escape the plain injunctions of the legislative authority. The law on this subject was in so lamentable a condition at the time of the revision of our statutes, that legislative interference was imperatively necessary. To meet the difficulty the revisers recommended two measures—first, a statutory specification of the cases in which implied revocations should be admitted; and, secondly, the utter exclusion of the courts from declaring any other implied revocations than those specified in the statute. To understand the scope and intent of these recommendations, the notes of the revisers to the sections reported, and which were before the Legislature when these provisions were adopted, afford most valuable assistance. These sections, they say, “it is believed, dispose of the whole doctrine of implied revocations.” “The object of the revisers is to prevent a constructive repeal of the Statute of Wills, and to secure to testators the power of disposing of their property to the same extent in which the Legislature meant to confer it. The law respecting implied revocations is in its present state a fruitful source of difficult and expensive litigation. It abounds with arbitrary rules and subtle refinements, the existence of which none but lawyers would be at all likely to suspect, and which are constantly applied not to carry into effect, but to defeat the intention of testators. That such is the actual state of the law has been acknowledged and lamented by the most eminent judges.” After quoting Lord Mansfield to the effect that some of the decisions were “shocking,” had “brought a scandal on the law,” and were “founded on artificial and absurd reasoning,” and after pointing out certain cases justifying these severe charges, the revisers proceeded to say that

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the provisions reported by them to the Legislature would, in their judgment, "close many sources of expensive and protracted litigation, and in numerous cases prevent the manifest intention of testators from being frustrated by the application of rules apparently revolting to common sense, and unintelligible to all not versed in the mysteries of feudal learning." They add: "The principle which has guided the revisers in the alterations which they propose is, that where a change has occurred in the domestic relations of a testator, where new objects, having peculiar and natural claims to his bounty, have come into existence, it is a presumption justified by reason and experience that his will is intended to be revoked; but that where no such event has occurred it is equally reasonable to believe, that a will not expressly and plainly revoked, is meant to have effect. In conclusion the revisers avow their conviction that a valuable service will be rendered the community if those cases in which alone implied revocations may be allowed, shall be defined by legislative authority. Experience may indeed discover that the enumeration is defective, and that cases now omitted ought to be included, but should this prove to be the case, the Legislature will be competent to apply the remedy. By new enactments they may supply the defects of the Statute of Wills, in the same manner as they are accustomed to amend and extend the provisions of other laws. To leave it to courts of justice, however learned and respectable, to declare in their discretion when implied revocations shall be admitted, is to involve the whole subject in doubt and perplexity. It is to commit to them the power, not of interpreting, but of repealing statutes, and to invest them with an authority paramount to the will of the Legislature, and often exercised in direct opposition to the will of the testator." (*8 Rev. Stat.*, 632.)

This is plain and pointed language, and it presented to the law-making power in the clearest manner the evil to be cured and the mode of curing it. The sections recommended for this purpose were adopted precisely as reported, except-

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ing a modification of section forty-four, which relates to the effect of marriage on the will of a woman made when a *feme sole*. This, in my opinion, disposes of the whole subject of implied revocation. The statute declares the effect of marriage, of birth of issue, of contracts to convey, of charges, incumbrances, conveyances, settlements, deeds, or other acts of the testator, by which his interest in property previously devised or bequeathed shall be altered, but not wholly divested, and determines when a revocation shall be effected, and when not. It precedes all these provisions by declaring that "No will in writing, except in the cases hereinafter mentioned, nor any part thereof, shall be revoked or altered otherwise than by some other will in writing, or some other writing of the testator declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed; or unless such will be burnt, torn, cancelled, obliterated, or destroyed, with the intent and for the purpose of revoking the same, by the testator himself or by another person in his presence, by his direction and consent, and when so done by another person, the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses." (2 *Rev. Stat.*, 64, § 42.) The Statute of Frauds (29 Car. II.) did not consider implied revocations; the Revised Statutes do, specifying the cases and circumstances, and expressly pronouncing that "except" in those "cases" no will in writing shall be revoked, unless by writing or act equivalent to physical cancellation. I am clear, therefore, that there can be no testamentary revocation except in the cases enumerated. In the teeth of the law so written, and in direct opposition to the intent by these enactments, of preventing courts "repealing" the Statute of Wills, by admitting implied revocations, were I to admit another exception, over and beyond those mentioned, I should inaugurate a new career of judicial discretion, "paramount to the will of the Legislature," and which it was the very design of these provisions to check. The statute is, in my judgment, then,

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a full and complete answer to the proposition that the will of Mr. Parish was revoked by implication.

II. By the will the testator's two brothers were constituted residuary devisees and legatees. The residue, which at that date, 1842, was estimated under forty thousand dollars, had increased very largely in 1849, and continued to accumulate rapidly until the testator's decease. The dispositions contained in the codicils, which were all made after the stroke of apoplexy in 1849, are all in favor of Mrs. Parish, with the exception of gifts to charitable uses amounting to fifty thousand dollars. Are these codicils, or is either of them, valid? The determination of this question involves primarily an ascertainment of the mental condition of Mr. Parish, in connection with his bodily condition: for though it be true that *in eo qui testatur, integritas mentis non corporis exigenda est*, yet in the present instance the rational was intimately associated with the physical state.

Mr. Parish was attacked in the month of July, 1849, with a stroke of apoplexy and paralysis. After the seizure "he soon began to exhibit confused consciousness;" "he recovered somewhat rapidly from this condition," and in the course of two or three weeks was able to sit up. From about the first of August, according to the evidence of Dr. F. U. Johnson, his progress in convalescence was "regular and rather more rapid than ordinary." The first codicil was executed on the twenty-ninth of August. Prior to this time, Dr. Johnson was able to communicate with him in propounding "simple questions as to the condition of his health and his symptoms," which "he appeared to understand," and "to answer intelligibly" by "a nod of the head and an attempt to say yes," or by "a shake of the head and a similar attempt to say no." The Doctor says: "He looked at me attentively while questioning him, apparently with intelligence;" his answers "were given promptly and decidedly;" "he appeared to understand simple questions regarding his health; I cannot say that he might not have understood questions equally, simple regarding other affairs." Dr. Delafield states

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that Mr. Parish "continued to improve irregularly up to about the first of October," when he was seized with severe and alarming disease in the bowels. Dr. Markoe testifies that Mr. Parish "improved steadily and regularly" during the months of July and August, and after the October illness rapidly, considering the grave nature of the complaint. At this time, and probably in the month of November, he was seized with epileptic spasms or convulsions, recurring at periods of eight or ten days, gradually diminishing to three or four weeks during the year 1850; intervals somewhat longer in 1851; once in four or six weeks in 1852, until at last six months or a year intervened. During these attacks "his face would redden violently, the whole body would be convulsed, and if not supported he would sink down." "The convulsion proper would pass in a few minutes; certain convulsive actions consequent upon it would last some hours," during which he would be "insensible, or nearly so." Dr. Delafield expressed the opinion that these symptoms "were connected with the condition of the brain left by the apoplectic attack," in which view Dr. Markoe coincided. In regard to the state of his physical appearance and health, the facial muscles were slightly drawn on one side, but this affection mainly disappeared in a few months. The power of speech was almost totally lost, never extended beyond a few monosyllables, which ultimately degenerated into guttural or inarticulate sounds; the left leg, arm, and hand were not affected by the paralysis; the right arm, hand, and leg were; the right arm became utterly useless, but he recovered in some measure the use of his right leg, so that it could be dragged along without its being lifted by another person; he walked slowly with a crutch and the aid of an attendant; his sense of hearing was good; the power of vision in his left eye was lost before his illness, that of the right eye continued sufficient for all ordinary purposes with the use of glasses. From November, 1849, his general physical health improved, and, with occasional exceptions, remained good until a short period before his decease. The most important of these excep-

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tions were the epileptic spasms, and several attacks of inflammation of the lungs. The immediate disease of which he died seemed to be congestion of the lungs, "as a main feature;" "a complicated disease," says Dr. Markoe, "depending, I should say, as we supposed upon the condition of the brain." During the entire period after his attack, Mr. Parish was dependent for all his physical wants upon the assistance of other persons; at morning in rising and dressing, during the day in walking, at night in undressing. All his customary business avocations ceased; he no longer attended his counting-house; he joined in no social engagements beyond his own home; he did not attend church; he could neither write nor speak in the ordinary acceptation of those acts; the sounds supposed to indicate the affirmative or negative were repetitions and generally inarticulate; his means of originating topics, necessarily limited, were not improved by artificial modes; he evinced greater emotional susceptibility than before his seizure; and his condition generally was marked by the symptoms of confirmed paralysis. On the other hand, he was addressed by his family and by friends, as intelligent; in conversation he was treated as comprehending what was said to him; facts were communicated in which it was conceived he would be interested; he was read to, and it was believed that he could read; accounts and documents were placed before him; his approbation or disapprobation was solicited in various matters, some of them of great magnitude and importance; he attended, and it was thought participated in family prayers; he was baptized and partook of the Holy Communion; and, in fine, was treated as possessing understanding, by persons of the highest character, who have testified before me to their conviction of his capacity.

It is not necessary for the exposition of my view of the case to exhibit a minute analysis of the special circumstances upon which the witnesses based their judgment as to the absence or presence of intelligence; nor to canvass the opposing medical opinions given by professional experts. I

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am not at all surprised that there should have been a difference of opinion. There is no department of scientific investigation so uncertain, in the glimmering light it affords, as that which concerns the relations of mental manifestations to the organism of the brain, and I should feel intimidated, were it essential for the solution of the question submitted to my judgment, to grope through those dark and mysterious recesses where lie hidden the subtle connections of mind with matter. The medical opinions and scientific theories in respect to the condition of Mr. Parish, the progress of his malady, the portion of the brain affected, and the mode in which the cerebral functions were involved, present an interesting discussion concerning the functions of the brain and nerves, and the effect of disease upon the intellectual manifestations. But yet for all practical purposes we must come down to the special phenomena which characterize this particular case, we must examine the apparent physical and rational symptoms by the light of such general physiological and mental laws as are ascertained, and thus endeavor to determine the degree of mental faculty possessed by the testator. I have already indicated the leading features which marked the invasion and course of the disease, and, with occasional exceptions, the observations I have to make do not require a more special symptomatic description.

III. "We may safely assume," observes Sir Benjamin Brodie, "as an established fact, that it is only through the instrumentality of the central parts of the nervous system that the mind maintains its communication with the external world." When therefore disease invades this nervous centre, we may expect, and we ordinarily find, some degree of disordered mental action. The weight of authority and observation is in favor of the position that apoplectic hemiplegia is accompanied with more or less disturbance of the intellectual faculties, and if the paralysis become permanent and severe, it is associated with symptoms of enfeebled mind. The same tendency is observed likewise in epilepsy. It is probable, therefore, that the faculties of the testator were

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in some measure weakened, in view of the obstinate character of his malady. Do the facts proved repel this probability? There are many acts in the ordinary course of daily life which are apparently intelligent, and yet do not indicate rationality proper. "Imbecility," says Duranton, "is that feebleness of mind which, without depriving entirely the person of the use of his reason, leaves only the faculty of conceiving ideas the most common, and which relate almost always to physical wants and habits." (Liv. 1, tit. 11, § 713.) In the animal creation, we find the senses, instincts, power of motion, some degree of memory, discrimination or preference, expression by sound, action, or signs, and traces of apparent intelligence often astonishing the curious observer, and presenting analogies to the action of the human mind. It was upon such phenomena a distinguished metaphysician based his distinction between the understanding and the reason, defining the former as the faculty which judges according to sense, and conceding its possession common to man and animals. We should not therefore attach much, if any importance, to a class of facts which in no respect betokens the possession of the rational powers proper. The same remark applies to acts conformable merely to the ordinary previous habit of life. The influence of long-continued practice or repetition leads to the unconscious and almost involuntary and unintelligent performance of an act which, taken singly, is generally the result of clear volition. "Habit," says Dr. Reid, "will operate without intention." "I conceive it to be a part of our constitution, that what we have been accustomed to do, we acquire not only a facility, but a proneness to do on like occasions, so that it requires a particular will and effort to forbear it; but to do it very often requires no will at all. We are carried by habit, as by a stream in swimming, if we make no resistance." The winding of a watch is ordinarily an act of the will, but by force of the repetition at stated hours or occasions it comes to be performed unconsciously and mechanically. Keeping in view these results of observation we find a large class of facts in the history of

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Mr. Parish after his attack, which do not indicate ideas beyond the range of "physical wants and habits," and which are not therefore inconsistent with an enfeebled mental condition.

When we approach other acts of greater significance, we are embarrassed with the difficulty arising out of the absence of definite means of communication. The proposition on the one side, that the testator's mind continued clear, sound, and in normal condition, that he comprehended, and his only inability consisted in the loss of the usual mode of expression, were it true, is not, from the nature of the case, capable of satisfactory demonstration. On the other hand, this very fact of the abrogation of speech is attributed, not to a mere paralysis of the organs of the voice, but to mental weakness. One theory refers the phenomena to mental and the other to physical difficulty. A man may be unable to speak either because he has no ideas, or because he has no efficient vocal organs—because there is nothing to express, or no power of expression. The probability in favor of either view must be determined by other considerations, and on other evidence than the mere absence of the power of speech.

IV. Let us take the case of a person of fair capacity and intelligence, decision of character, and firm will, accustomed to read and write, suddenly deprived of speech. The mind is imprisoned in its full vigor and its unabated powers, and there is an instinctive and immediate effort towards expression in the usual modes by words and sounds, and these failing, by signs and gestures. The desire for communication is one of the first impulses of our nature. To be cut off from all expression of thought and sentiment, to be deprived of the means of moral, social, and intellectual communion, to be shut up in the chambers of the soul without the power of telling to the objects of our affections or friendship our wants, sorrows, joys, and hopes, is so terrible a calamity that all the powers of the mind and all the resources of ingenuity are called into action to devise the means of escape. We accordingly find in cases where the faculties are not impaired,

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that arbitrary signs are readily invented and resorted to, and artificial means of communication established in the place of those which have been interrupted. The obstacles interposed to the expression of ideas by defects in the organs of speech are usually overcome without much difficulty, when the mind continues in a sound and vigorous condition. Constant inducement was presented to Mr. Parish in regard to the ordinary affairs of domestic life, matters of personal comfort, relief from bodily ailment, the momentous concerns of religion, and the anxieties incident to temporal interests of great magnitude, to contrive some mode of manifesting his will with freedom. Indeed, various methods were suggested and urged upon his attention, any one of which if adopted would measurably have relieved his necessities. The first thought was of writing. He had his sight, was supposed to be able to read, and to understand letters and numerals. To all appearances he retained the use of his left arm and power of control over the action of the hand and fingers. That the habit of writing legibly with the left hand may be acquired where the right side is paralyzed, is shown by the evidence afforded in the cases of Dr. Brownlee, Mr. Delaplaine, and Mr. McDonald. Efforts to induce a similar habit with Mr. Parish were repeatedly made, and in various ways, with pencil, paper, and slate. A blackboard was placed before him, the process of writing on which requires rather a motion of the lower arm, than a special or complicated action of the fingers. A copy for imitation was occasionally at hand, the attempt was again and again made, and yet, with the exception of a few letters, he utterly failed, and no result of any general practical value was obtained. He was invited to other methods which demanded the mere act of pointing out letters and words, and the simplest process of mental combination, but he declined the effort. Whatever may be said therefore as to the abolition of the power of speech being attributable to paralysis of the organs or nerves, it seems to be clear that there was no physical impediment to each and every one of the other means of communication proposed or

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attempted. He was understood at times to be earnest and anxious in the desire to have some particular thought or wish expressed; his friends sought to afford relief by numerous and continued suggestions, and this struggle occasionally lasted for hours, if not days. Here then was the present pressing want, and can we believe that if the intellectual power had been existing in full force, means of expression would not have been adopted from among those placed before him? We know so little of the action of the mind, in its physical relations, that one should hesitate in positive affirmations as to its condition, in the absence of the usual modes of expression. But still judgment, in default of certain proof, must be based upon the most probable grounds; and in view of all the circumstances of the case, I think that by fair and reasonable inference the failure of Mr. Parish to communicate by some arbitrary or artificial means, is attributable to mental weakness. To what extent this existed it is impossible to indicate with any measure of accuracy. Where speech is preserved, it is frequently difficult to fix what d'Aguesseau terms "the doubtful and uncertain point where reason vanishes and incapacity appears;" but the trouble is largely increased when there are no signs of a certain and determinate character by which the thoughts are definitely manifested. I am not indifferent to the argument that many proofs of intelligence are indicated by the expression of the countenance, in the play of the features, lineaments, and muscles. In this respect nature has a language interpretable though voiceless, but it is very obvious that its scope is limited, and the absence of any precise standard renders it an uncertain method of communication. It depends much upon individual opinion and construction, allows large room for the imagination of the observer without a test to correct his errors, and is therefore exceedingly liable to misapprehension and misapplication. Nor are the means of judging greatly amplified by the fact that the subject of observation appears to give affirmative and negative answers to interrogations, for notwithstanding the reply may

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seem sensible, it affords but little opportunity of judging whether the response is one of mere acquiescence, or has involved some considerable action of the intellectual faculties. While therefore in this branch of the case I feel bound to respect the opinions of witnesses whose observations and judgment are entitled to great weight and consideration, I am still conscious of resting more on the ground of conjecture than of certainty. The doubt as to the condition of the testator's mind, and the extent to which it was weakened, cannot, from the nature of the case, be clearly and satisfactorily resolved by evidence of this nature, though the best and most reliable of its kind.

V. Not possessing the means of communication, Mr. Parish was evidently void of the power of indicating such ideas as his mind was capable of conceiving, and of carrying out his wishes into actions, unless by signs or expressions he could direct the ingenuity of those around him to the suggestion of the idea to him, so as to call for his answer. He could therefore perform no act requiring the intervention of others, unless the volition had first passed through the mind of another, and been returned to him—and then, to be the proper expression of his mind, the thought so returned must be the exact counterpart of his. If it varied, he had no power to modify it or to invite a new suggestion, except by total rejection; and yet it might be as far from his wish to reject it totally, as to adopt it wholly, and to do either would endanger or destroy the chance of its repetition in a modified form. To answer in the negative or in the affirmative might be equally aside of his purpose. He was therefore substantially deprived of the power of spontaneous action, or indeed of any action at all except within the narrow boundary of assent or dissent to interrogative propositions; unless the object of his wishes were placed within his view, and then he was incapable of expressing any complicated thought. This is true—however strong may have been his desires or his determination, or however rational the action of his mind; but, if his mental faculties were weakened, then, in addition

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to the impossibility of communication, would exist a tendency passively to acquiesce in the suggestions of others. It is manifest, therefore, that in such a matter as the disposition of his property, whatever might be proposed to him was the emanation of the mind and will of some other person. A will by interrogation is not favored. "If," says the Touchstone, "some friends of a sick man, of their own heads, shall make a will, and bring it to a man in extremity of sickness, and read it to him, and ask him whether this shall be his will, and he say yea, . . . the testimony is very suspicious." The essence of the act is volition. The will is the centre of the soul and the source of all intelligent action. Though moving rationally, the vigor of the will may be so impaired, and the degree of weakness be so low, that mere suggestion may determine the movement, the presentation of a thought may be sufficient to guide the sluggish current into acquiescence. In such a case it is not the will of the testator, not the self-originated, independent, spontaneous result of his own volition, but the reverberation, the echo of a stronger mind. While the law sacredly and tenderly regards the right of the owner to dispose of his property, with full and absolute power of dominion, so that his will stands as the reason of his acts; yet when the mental faculties are enfeebled, the same tender regard for his will leads to careful scrutiny and rigorous examination, to guard against its invasion and surrender to a stronger power. The weaker the volition, the more jealous watch is set against all external interference.

By the Roman law it was ordained that the writer of another's testament should not mark down a legacy for himself. (*Suet. Ner.*, 17, *Dig. l. 48, 34.*) Although this was not adopted as an absolute rule in the spiritual courts of England, yet it has been constantly recognized in testamentary cases to the extent of requiring a different degree of proof where the will has been made by the intervention of the party profiting by its provisions, and occupying relations of confidence and influence towards a testator of weak or doubtful capacity. For example, where the parties are in the

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relation of guardian and ward, principal and agent, trustee and *cestui que trust*, attorney and client, the court is exact and scrutinizing in its requisition of the plainest evidence of volition and capacity. The decisions on this point show, in the language of Sir John Nicoll, "how extremely jealous the law is to protect the unwary against undue influence and control. Where that relation of confidence exists, and where the party frames the instrument for his own advantage and benefit, every presumption arises against the transaction." In such a case, he adds, "it is not necessary to prove fraud and circumvention," but the proponent "must remove the suspicion by clear and satisfactory proof." I think it would be more accurate to classify this among the rules of evidence applicable to testamentary clauses, than to declare that from a certain state of facts the court presumes fraud; for while there can be no reasonable doubt of the salutary tendency of such a rule, and the propriety of its application, there may exist just cause for hesitation in pronouncing judgment of actual fraud. It is obvious that the failure to produce the supplementary evidence which the law thus demands, may arise from accident or the peculiar circumstances of the case, and that the conclusion may not therefore necessarily involve the existence of fraud in fact. In passing sentence of probate the court must be satisfied that the instrument propounded contains the true will of the deceased. The mere *factum* of the instrument is ordinarily sufficient for this purpose; but when the proofs indicate the danger of relying upon such a presumption, the law demands more evidence. The principle involved in this rule is of the greatest consequence in the administration of justice; and its practical application is commended by considerations of public policy, as well as a due regard for the proper exercise of the testamentary power. It requires from a party presenting to the probate court, for judicial ratification, a will made through his instrumentality, and disturbing for his benefit the usual course of inheritance and succession, by a decedent of weak or doubtful capacity, dependent more or less upon the beneficiary, evidence out-

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side of the document itself, that the contents were understood by the decedent, and were conformable to his real wishes, that the act was the result of free volition, the actual will, *voluntas ipsa*, of a competent mind. The writing itself does not afford enough proof, but additional, independent, extrinsic evidence must be supplied; and if from any cause that fail, probate must be denied. The security of property, the protection of heirs, wise public policy, as well as the principles of reason and justice, indicate this as a rational rule of evidence. It has found place in every system of enlightened jurisprudence, and is of familiar application in courts of equity as well as in the ecclesiastical tribunals.

VI. There is, of course, no arbitrary standard of what constitutes satisfactory extrinsic evidence; for as the object is to ascertain whether the alleged disposition conforms to the intent of the decedent, regard must be had to his special condition, the state of his family relations, the condition of his fortune, the natural objects of his bounty, his expressed declarations, his previous testamentary acts, and many other circumstances tending to inform the mind of the court whether the will propounded was a reasonable and probable act.

In respect to the first codicil, two circumstances incline me to admit it to probate. In the first place, it is rather in confirmation of the dispositions of the previous will than in hostility to them. By the will the testator had given to Mrs. Parish his residence in Barclay-street, together with the house adjoining, after Mrs. Payne's decease. He subsequently sold this property, and the value of other devises in her favor had somewhat diminished. From the testimony of Mr. Havens, it is clear that the testator was anxious "to make a very ample and liberal provision for his wife;" his expressions on this point were repeated and emphatic. It was quite natural, therefore, that when he had purchased the land on Union Square, as a site for a new residence, he should propose a change in his will conformable to this new plan.

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We accordingly find that after his return from Europe he communicated with Mr. Havens on this subject, and inquired "whether the making of a codicil would in any way affect the main features of the will, affect the will itself, except as altered by the codicil." Mr. Havens says: "He either stated to me, or I have a distinct impression from what he said, . . . that he did not contemplate any very material alteration of his will. The only subject I recollect his speaking particularly of, was the Barclay-street house and the Union Place property. I can't say that I have a distinct recollection of what he said in relation to these pieces of property, but my impression is very strongly this, that he wished to substitute the Union Place property for the Barclay-street property in the provision for his wife, in consequence of Barclay-street not being a desirable place of residence for his widow." A provision for the continued occupation of the family mansion by the widow, and for the adequate support of the establishment, usually appears in the wills of testators in comfortable or affluent circumstances; it harmonizes with the domestic affections, and with those sentiments that gather around our home and inspire us with a desire for its continued preservation. This feeling was not likely to be diminished in the present case, because the new mansion had been constructed by Mr. Parish, and been adorned in a style corresponding with his great wealth. The evidence tends to show that he thought the former residence unsuitable for his wife, and that he consulted her pleasure in the erection and arrangement of the new edifice. Under the circumstances, it would have been remarkable had he contemplated that on his decease his home should pass away from the possession of his widow into other hands, and she be compelled to leave that which had been prepared and embellished with so much care. He had not designed this in respect to the more humble residence, and it is consonant with every reasonable probability that it was not his purpose in regard to his new abode. The "ample and liberal provision" adequate for the support of the establishment in Barclay-

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street might reasonably be enlarged to correspond with the expenses attendant upon the residence in Union Square. At an interview on the 25th of August, 1849, between Mrs. Parish and Mr. Folsom, who had long been Mr. Parish's confidential clerk, the latter expressed the opinion that Mrs. Parish desired to obtain the Union Square property; to which that lady replied, "Mr. Parish always told me that he intended to give me the Wall-street and Union Square properties." Mr. Folsom offered to ask the question, and they accordingly proceeded into Mr. Parish's presence. The inquiry was made, "Should any thing occur to you, do you wish this property to revert to Mrs. Parish?" and the same form was repeated as to the Wall-street lot; to each of which questions Mr. Parish made a negative motion of the head. On Mrs. Parish observing that the questions were not properly put, they were framed in this mode: "In case of your death, do you wish to give this property to your wife?" and was repeated in the same manner as to the Wall-street lot; to each of which Mr. Parish made a nod of the head. It is not impossible that the use of the term "revert" in the first instance, and of "gift" in the last, was the reason for varying the reply. In this connection it is proper to mention, that shortly after recovering consciousness subsequent to his first attack, and while still lying in bed, Mr. Parish was supposed to indicate anxiety to make some communication: a pencil was put in his hand, and he made efforts to write with his left hand. "The characters were always the same, and were construed to mean the word 'wills.'" The writing is in evidence, and presents some features favoring the conjecture.

I am inclined to think more favorably of the condition of the testator's mind prior to the illness of October, 1849, and to the appearance of the epileptic spasms, than afterwards. The first action of the apoplectic stroke upon the brain is of a mechanical character. The authorities favor the conclusion that on the absorption of the blood and removal of the pressure, in ordinary cases of apoplectic effusion, we may "look for a fair degree of recovery in the course of a few weeks."

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Where the recovery is not complete, secondary consequences ensue, indicating disease of the brain, "developed in consequence of the apoplexy and the healing process." On the first revival of the patient from the shock, on the return of consciousness, and the restoration of physical strength, his mental faculties would seem to be nearer a normal condition than after symptoms of a secondary nature are exhibited. However this may be, I am of the opinion, upon the evidence, that Mr. Parish, at the time of the execution of the first codicil, possessed testamentary capacity, though enfeebled; that the codicil, in its scope and effect, was reasonable and probable; that the subjects of the disposition were simple and easy of comprehension; and especially that as to one of the leading features of the devise, the gift of the residence on Union Square, there is proof, after the making of the will, of an intention to substitute this property in place of the Barclay-street residence.

VII. As to the remaining codicils there is no such extrinsic evidence, and from the nature of the case there could be none, as the subjects of disposition substantially accrued after July, 1849, and the means of communication, after that date, were interrupted. But it is claimed that the proportion of his estate bequeathed to Mrs. Parish, according to its value in 1842, rendered it probable that when his property appreciated so largely, he would proportionately increase the provisions in her favor. This may or may not be. It is mere conjecture, founded on the notion that the will was only a temporary or conditional adjustment. The whole tenor of the evidence on this point, however, gives a different impression.

Though made on the eve of a contemplated voyage to Europe, the will was prepared with careful reflection. There were frequent and almost daily consultations between Mr. Parish and the counsel employed, during a period of about two weeks; and, to use the language of Mr. Havens, "the matter was done with the utmost deliberation and consideration—much more than in any other case which occurred

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during my practice." A man of large estate, arrived at the age of fifty-four, without children, his social and domestic relations definitely marked, and the general plan of his testamentary intentions not likely to change, devises a plan of disposition which embraces numerous objects of bounty, and which presents the appearance of being a permanent scheme for the division of his estate, by providing for various contingencies, among which is the further acquisition of property. It was urged on the argument, that as the amount of the residuary estate remaining, after all other testamentary provisions at the time of the execution of the will, did not exceed the sum of forty thousand dollars, the testator did not contemplate that under that residuary clause his brothers Daniel and James should ultimately receive an amount, which, by reason of the increase of his estate, immensely exceeded the residue at the date of the will. It must readily be admitted that the testator did not foresee the actual result of this residuary clause, but this does not detract from the force of his general intent. The will was made under the advice of competent counsel, and the legal effect of a general residuary devise and bequest, it is proper to presume, was presented to his mind. The will speaks at the time of death, and it is the very nature of a residuary clause to be prospective. But as if to remove every possible doubt, to make this point clear and beyond misconception, and to show he did not intend to limit the gift to his two brothers to the residue as it then stood, the fourteenth section especially declares, "It is my will and intention that all the property, real and personal, that I may own or possess at the time of my decease, shall pass under this will;" and still to increase the certainty, it proceeds, "whether the same be now owned or possessed by me, or may be hereafter acquired by purchase, descent, distribution, or otherwise." How any language could more exactly and explicitly express an intention to pass whatever residue might be existing at the time of his death, it is difficult to conceive. The legal effect of the residuary clause is expressly stated to be his testamentary

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intention, in the full and declared prospect of an increase of his estate by purchase or otherwise. He was then in the vigor of health—the prolongation of his life, and the advancement of his fortune, were probable contingencies, and in view of them he pronounces emphatically that the disposition then made, had in view whatever property he might subsequently acquire and own at the time of his decease. An instrument prepared with such grave consideration and mature reflection, embracing gifts to numerous relatives and friends in minute detail; providing against lapse by death, and in terms looking beyond the estate he then had to what he might possess at the time of his decease; must be regarded, not as a temporary or provisional arrangement, but as a definitive disposition—a plan designed in its prominent features and general tenor to be permanent. Full scope must be given both to its legal effect and the intention manifestly declared; and there is no more ground for asserting that it was not the intent to bestow upon his brothers all the residue existing at the time of his death, than for impeaching any special devise or bequest contained in the document. A will made so deliberately, when the testator was in full vigor of mind and body, and which remained unaltered for seven years, though circumstances had occurred calling for modification, presents in itself a strong presumption against changes made when the mind had become weakened by disease. In the absence of all extrinsic proof rendering such changes probable, in default of any evidence outside of the codicils, and superior in degree to that which the codicils themselves afford, effect cannot be given to those instruments.

The testamentary power has always enjoyed the highest degree of favor from the law. It has come down to us through a long series of ages from the fountains of Roman jurisprudence, with sanctions, guards, and muniments designed to secure as well the liberty of the testator as the peace and the welfare of society. Experience and high considerations of public policy have manifested the necessity of certain rules for its exercise, not only as to substantial requirements, but

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as to forms and ceremonials, and modes of proof. First, and above all, and as the very essence of the act, as the element which gives it all its character and importance, is its entire and absolute freedom, that independence which must accompany every voluntary action. So much is this regarded, that it gives the name to the act—the will. When this is ascertained in a legal way, the law gives it effect without inquiring into the motives and reasons. In this position stands the will made by Mr. Parish in 1842; when his mental faculties were sound, his mind was unclouded, and his power of expression perfect. But when the condition of the testator's mind involves the inquiry whether the instrument propounded as his will really conforms to his sentiments and wishes, and when his faculty of communication is so far gone as substantially to annihilate the means of imparting ideas and originating the terms of a testamentary act, rules of evidence come into operation, based upon sound general principles and considerations of expediency, having relation to the ordinary motives of human action. The result of their application in a particular case may seem more or less just or unfortunate, but they cannot be swerved from to meet possible hardships, or be swayed to and fro at the arbitrary discretion of the judge. I have applied these principles as I understand them, to the case now before me, and the general conclusions to which I have arrived may thus be summarily stated.

1. The will, bearing date 20th September, 1842, was a valid subsisting testamentary instrument at the time of the decedent's death, and remained unaltered and unrevoked, except to the precise extent and degree it was modified by acts of the decedent subsequent to its date.

2. The decedent by his attack in July, 1849, was not permanently deprived of testamentary capacity. His faculties, however, were enfeebled and impaired, and his power of mental manifestation was greatly affected.

3. In a case of this kind it becomes necessary to satisfy the court, beyond the mere *factum* of the instrument, that

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its provisions were the free expression of the decedent's will.

4. It is proper therefore to inquire whether the act was reasonable, natural, and probable; whether it was conformable to his known affections and dispositions, and consistent with his previous declarations and intentions; whether it was in favor of parties occupying positions of influence; and who were active in its suggestion, and participated in its performance; whether the decedent was dependent upon the beneficiaries in his ordinary habits of life, and the management of his property and affairs; and whether he was capable of giving, and did give instructions, and originate the provisions. Through these various lines of examination a conclusion may be attained, whether there is or is not affirmative proof in aid of the instrument.

5. Placing my judgment upon these principles, and their application to the proofs, I have determined that the evidence in respect to the codicils of September 15th, 1853, and June 15th, 1854, does not justify their establishment: that in view of the time of the execution of the codicil of August 29th, 1849, the circumstances, previous, attendant, and subsequent—the state of the decedent's mind at that stage of his disease, and with a due regard to the subject of that instrument (the dwelling-house on Union Square and the Wall-street premises), there is reason to conclude upon the evidence that the provisions of this codicil were in harmony with his wishes.

There must be sentence admitting the will and the first codicil, and rejecting the other instruments propounded. The costs of the parties will be paid out of the estate.

The proponent, Joseph Delafield, as executor and legatee, and Mrs. Parish, as legatee, appealed to the Supreme Court from that part of the Surrogate's decree which rejected the second and third codicils. The Supreme Court, at General Term, affirmed the Surrogate's decree, with opinion by DAVIES, J.

An appeal was then taken to the Court of Appeals, where the judgments below were affirmed, with opinions by DAVIES, SELDEN, and GOULD, JJ.

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Those opinions are here given from a desire to preserve the unity of this interesting and important case, and present it entire to the profession. The cause was argued in the Court of Appeals by ALEXANDER S. JOHNSON, for the appellants, and by JOHN K. PORTER, for the respondents.

DAVIES; J., delivered the opinion of the court.

This is an appellate tribunal, and its ordinary duty is to review the decisions of the court from which appeals lie to it, solely on questions of law. There is a class of cases, however, where it is incumbent on us to review questions of fact, and the present cases are of that character. We are called upon, by the appeals taken therein, to affirm, or reverse, the decree of the surrogate of New York, which on appeal has been affirmed by the Supreme Court of the First Judicial District. By that decision the surrogate refused to admit to probate two codicils to the will of Henry Parish, deceased, alleged to have been made by him, one on the 15th of September, 1853, and the other on the 15th of June, 1854.

It appears that Mr. Parish, while in conceded health, in the full possession of all his faculties, and after much deliberation, frequent consultation and discussion with his counsel, on the 20th of September, 1842, made and executed his last will and testament. Although his attention seems to have been afterwards, on several occasions, attracted to its provisions, and although he must have been aware that the devise to his wife of two pieces of real estate, in the city of New York (one of which was the dwelling-house occupied by them), had been rendered inoperative by the sale of them, and although he was equally conscious that his estate had been greatly augmented, and was constantly increasing by its annual accumulations, yet while in health he intentionally and deliberately declined to make any alterations in its provisions, and for nearly seven years, notwithstanding these and other changes, persistently adhered to it, as originally framed and executed. It is seldom that so much intelligent consid-

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eration, fixedness of purpose, and adherence to conclusions, are evinced in the preparation and execution of a will.

On the 19th of July, 1849, Mr. Parish, while in the apparent enjoyment of full health, was struck with an attack of paralysis, described by the physician as hemiplegia. Whether or not he had testamentary capacity after that period, has been the subject of the elaborate investigation, and the learned, able, and extended discussions in these cases.

At the time the will of 1842 was made, the testator had no child, and made no provision for any. He never had one. He estimated the total of his estate, real and personal then, to be \$732,879. By this will he gave to his wife \$331,000, including the two pieces of real estate subsequently sold by him, and which he estimated at \$23,000. To the relatives of his wife he gave specific legacies amounting to \$95,000. At the time of his attack, although he had reduced the provision made for his wife, \$23,000, by the sale of the two pieces of real estate mentioned, yet he had increased the value of the New Orleans real estate given to her, by an expenditure thereon amounting to \$21,500, and by addition to his furniture, paintings, statuary, silver, &c., equal to about the sum of \$25,000, all which, by the provisions of the will, were given to her. He had therefore kept good the amount secured to Mrs. Parish by the will, and had enhanced it in the manner indicated, so that on the 1st of July, 1849, it amounted, according to his estimate, to about the sum of \$350,000.

He thus, on grave deliberation, gave to his wife and her relations nearly two-thirds of his whole estate as it then existed. By his will he also gave specific legacies to various relatives of his own blood, and to personal friends, amounting in the aggregate to the sum of \$270,000, and then *gave the residue and remainder of his estate to his two only and surviving brothers, Daniel Parish and James Parish.* The amount they would have taken, according to the testator's estimate of his estate, at the date of his will, if it had then taken effect by his death (an event which it is apparent he did not then contemplate as likely soon to happen, being

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then 54 years of age, and in apparent good health), would be about the sum of \$18,000 to each, less than the amount of the legacies given to each of his sisters. The small sum given to his brothers, in comparison to the amount given to others, and the language used in the will, as applicable to this residuary devise, are convincing evidence to our minds of the testator's intention to give permanency to the disposition of his property then made by him, and of his expectation that this residue would ultimately secure to his brothers such an ample portion of his estate, as would evince his affection for them, and satisfy them that their just and natural right to share in his estate had been fully recognized by him. His solicitude, in the first place, to make ample provision for his wife, is clearly apparent from the testimony of Mr. Havens. He was not only desirous of securing her such a portion of his estate as would enable her to maintain her established position in society, and supply to her all the wants and luxuries to which she had been accustomed, but he was also anxious that the provision should be so ample, that a carping and fault-finding world should so esteem it. As already observed, by his will, he constituted his two brothers his residuary devisees, and declared (and such declaration controls this residuary clause) that he intends his will not only to apply to the property then owned by him, "*but to all that may be thereafter acquired, by purchase, descent, distribution, or otherwise.*"

At this time the testator's income was about \$60,000 annually, and his expenses were about \$10,000 a year. Without any extraordinary expenses or outlays on his part, the testator must have been aware that his estate would be augmented by its natural increase by about the sum of \$50,000 annually, and this entirely independent of the additions by profitable investments, and other uses of his means, which it is apparent were employed by him to increase his wealth. The inventory of his estate made by him July 1, 1849, shows it had increased in seven years, at the valuation he then put upon the various items of his property,

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about the sum of \$200,000; and add thereto the expenditure on the Union Place property over and above his estimate of its value, \$52,000, and the actual increase was over \$250,000. He was, therefore, well aware, that by the terms of his will, these augmentations of his estate would fall into the residuary clause, and go to his brothers. Their portion of his estate, he must have seen, would be munificent, and such as brothers in these circumstances would naturally expect from a wealthy brother, dying without issue, after making ample provision for his widow. The testator witnessed this augmentation with full knowledge of its destination, and with the certainty of its continuance and increase, for the period of seven years, without any intimation of a change of his purposes, or expressing any wish to divert it to different objects.

Such was the permanent character of the disposition made by the testator of his estate, in full health, and such his final and settled purpose in reference to it, down to the time of his attack in July, 1849. From thence till his death, in March, 1856, the wife of the deceased was hardly ever absent from his presence, and she and her relatives were his constant companions and attendants, to the exclusion almost wholly of his own relations, with whom, up to this period, it would appear, he had always lived on terms of intimacy and cordiality.

Mr. Parish having recovered from the severity of his attack, a codicil was prepared at the suggestion of Mrs. Parish, for him to execute, and which was executed on the 29th of August, 1849, whereby the testator gave to his wife certain real estate, amounting in value to about the sum of \$200,000. The learned counsel who drew this codicil at the request of the devisee, and superintended its execution, having, as he says, fears that others might have doubts of the testamentary capacity of the testator, recommended that it should be re-executed when his health and mind should have improved; and it being supposed that such improvement had taken place, it was accordingly re-executed on the 17th of December, 1849.

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In September, 1853, Mrs. Parish and her brother having made an estimate of the estate of Mr. Parish as it then was, and valuing the same at \$1,186,960, Mrs. Parish drew up instructions for the disposition of about \$500,000 of personal property, and employed the same counsel who had drawn the codicil of 1849, to prepare another for Mr. Parish to execute, disposing of this amount of personal estate, all of which was to be given to Mrs. Parish, except the sum of \$52,000 invested in stocks, to be given to certain charities. It was claimed by Mrs. Parish that nearly all of this property was then hers, by virtue of gifts from her husband since his attack, *inter vivos*, and the nominal title to which had been changed by her from his name into hers. This codicil was doubtless prepared in consequence of the suggestion of the counsel, that grave doubts were entertained of the validity of these gifts, *inter vivos*. A codicil was accordingly prepared (incorporating into it the codicil of 1849), by which personal property amounting to \$349,460 was given to Mrs. Parish, and \$50,000 to be divided among certain enumerated charitable institutions. It also revoked the appointment of Daniel Parish as one of the executors of the will of 1842, and the legacy of \$10,000 given to him by that will.

On the 15th of June, 1854, a third codicil was prepared by the same counsel at Mrs. Parish's suggestion, and which was executed on that day, which revoked the residuary gift and devise in the will of 1842 to the brothers Daniel and James, and installed Mrs. Parish in their place as the devisee of the whole residue of his estate.

It would seem from the testimony, if Mr. Parish's signs and gestures were correctly interpreted, that it was his will, at the time of the re-execution of the codicil in December, 1849, to revoke and annul the specific legacies, amounting to the sum of \$130,000, given by the original will to the children of his brothers Daniel and James; and it appears he was only deterred from insisting that it should then be done, by the remark of the counsel, "that he wished it might not then be done; that it would fatigue and disturb Mr. Parish;

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that it would require a great deal of deliberation;" and by the assurance given by the counsel "that he could come and do it at some other time." At the time of the preparation and execution of the codicil of September, 1853, in the numerous interviews and consultations had in reference to it, it does not appear from the testimony that any suggestion was made by the counsel to Mr. or Mrs. Parish in reference to the revocation of these legacies, or that the subject was alluded to by either Mr. or Mrs. Parish. At the time of the preparation of the codicil of June, 1854, in an interview between Mrs. Parish and the counsel, in Mr. Parish's presence, she again suggested that Mr. Parish wished to revoke these legacies, and the counsel understood Mr. Parish as so desiring; but on a suggestion of the counsel, that "it would be harsh to do so," the subject was dropped. It is apparent, if Mr. Parish had a wish on this subject, and it was correctly understood, it was not carried into effect by those around him, and who were alone competent, or had the power to impart vigor and give effect to his wishes. At any rate, their revocation was not incorporated into either of the codicils of December, 1849, or of June, 1854. It is therefore undeniable, that if these codicils expressed *a portion* of his wishes as to the disposition of his property, they failed to give expression to *the whole* of them, and that, as to this large sum of money, it took a direction, if Mr. Parish's gestures and signs were correctly interpreted, contrary to his expressed and earnest intentions; and his acquiescence in the suggestions made, if he did so acquiesce, shows conclusively the feebleness of his purposes, and his ready submission to the will of others.

The surrogate of New York, after a most protracted examination of witnesses, with the opportunity of hearing, and himself taking down their testimony, carefully weighing and arranging it as the investigation proceeded, scrutinizing each witness, and his manner on the stand, with the great advantage of personally seeing the intelligence, candor, accuracy, and truthfulness of each; aided by the elaborate discussions

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and critical analysis of the facts by the able and distinguished counsel employed in the case—found and decided as matter of fact that the testator had not testamentary capacity on the 15th of September, 1853, or on the 15th of June, 1854, to make the two codicils of those dates respectively, and that they were not his will or any part thereof, and he refused to admit the same to probate. This decree has been affirmed by the general term of the Supreme Court, and from that decision, those claiming the codicils to be valid, have appealed to this court.

Before proceeding to the examination of the facts in the present case, it may aid us in arriving at a correct conclusion to advert to a few rules of law, which it is deemed are well recognized and long established.

It is provided by the statute law of this State, that "all persons, except idiots, persons of unsound mind, married women, and infants, may devise their real estate, by a last will and testament," duly executed, in accordance with the formalities prescribed by law (2 *Rev. Stat.*, 57, § 1); and that "every male person of the age of eighteen years or upwards, and every female not being a married woman, of the age of sixteen years and upwards, of sound mind and memory, and no other, may give and bequeath his or her personal estate by will, in writing" (2 *Rev. Stat.*, 60, § 21); and the Statute of Wills of 34 & 35 Hen. VIII., declares that no will of lands shall be valid if made by any "idiot, or by any person of *non sane* memory." But competency to execute a testament does not exist, unless the alleged testator has reason and understanding sufficient to comprehend such an act. (*Swinburne on Wills*, part 2, § 4; *Marquis of Winchester Case*, 6 *Rep.*, 23 a; *Cambe's Case*, *Moore*, 759; *Herbert v. Lowe*, 1 *Ch. R.*, 12, 13; *Mountain v. Bennett*, 1 *Cox*, 353.) In the *Marquis of Winchester Case*, it is said that "by law it is not sufficient that the testator be of memory, when he makes his will, to answer familiar and usual questions; but he ought to have a disposing memory, so that he is able to make a disposition of his lands with understanding and reason,

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and that is such a memory which the law calls sound and perfect memory." In *Mountain v. Bennett* (1 *Ch.*, 353), the Lord Chief-Baron said: "Two things must be made out, in the first instance, by those who support the will—the formality of the instrument, and the sanity of the person making it; that, if a party impeaching a will relies upon actual force being used upon the testator, it is incumbent on him to show it;" and he adds that "there is another ground, which, though not so distinct as that of actual force, nor so easy to be proved, yet if it should be made out, would certainly destroy the will—that is, if a dominion was acquired by any person over a mind of sufficient sanity to general purposes, and of sufficient soundness and discretion to regulate his affairs in general; yet, if such dominion or influence were acquired over him as to prevent the exercise of such discretion, it would be equally inconsistent with the idea of a disposing mind." Lord KENYON, in addressing the jury in *Greenwood v. Greenwood* (3 *Curteis*, app. 2), says: "I take it, mind and memory competent to dispose of his property, when it is a little explained, perhaps may stand thus: having that degree of recollection about him that would enable him to look about the property he had to dispose of, and the persons to whom he wishes to dispose of it; if he had the power of summoning up in his mind so as to know what his property was, and who those persons were that then were the objects of his bounty, then he was competent to make his will."

In *Marsh v. Tyrrell* (2 *Hagg.*, 122), that experienced and learned judge, Sir JOHN NICHOLL, said: "It is a great but not uncommon error, to suppose, that, because a person can understand a question put to him, and can give a rational answer to such a question, he is of perfect sound mind, and is capable of making a will for any purpose whatever; whereas the rule of law, and it is the rule of common sense, is far otherwise: the competency of the mind must be judged of by the nature of the act to be done, from a consideration of all the circumstances of the case."

The observations of ERSKINE, J. (*Harwood v. Baker*, 3

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Moore P. C., 282-290), a case not unlike that now under consideration in some of its leading features, are worthy of note. He says: "But their lordships are of opinion, that, in order to constitute a sound, disposing mind, a testator must not only be able to understand that he is by his will giving the whole of his property to one object of his regard, but that he must have also capacity to comprehend the extent of his property, and the nature of the claims of others, whom, by his will, he is excluding from all participation in that property;" and he justly and truthfully adds, "that the protection of the law is in no cases more needed than it is in those where the mind has become too much enfeebled to comprehend more objects than one, and most especially when that one object may be so forced upon the attention of the invalid as to shut out all others that might require consideration; and therefore the question which their lordships propose to decide in this case, is not, whether Mr. Baker knew when he was giving all his property to his wife, and excluding all his other relations from any share in it; but whether he was at that time capable of recollecting who those relations were, of understanding their respective claims upon his regard and bounty, and of deliberately forming an intelligent purpose of excluding them from any share of his property." Mr. Justice WASHINGTON, in *Harrison v. Rowan* (3 Wash. C. C., 385, 386), speaking of the capacity of a testator necessary to a valid will, remarks: "He must, in the language of the law, have a sound and disposing mind and memory. In other words, he ought to be capable of making his will with an understanding of the nature of the business in which he is engaged, a recollection of the property he means to dispose of, of the persons who are the objects of his bounty, and the manner in which it is to be distributed between them."

In *Den v. Johnson* (2 Southard, 454), the chief-justice, in charging the jury on this point, said, "that a disposing mind and memory is a mind and memory which has the capacity of recollecting, discerning, and feeling the relations, connections, and obligations of family and blood; that, though it

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has been sometimes said, as had been stated, from the books, that if one could correctly tell his name, say the day of the week, or even ask for food, it is a sufficient evidence of a disposing mind; yet such sayings, though they show that wills are not likely to be set aside on suggestions of incapacity, can and ought to have but little weight with rational men, investigating the truth upon their oaths; that if, upon the whole, they should be of opinion that the mental powers of the testatrix were so far enfeebled and broken as that she could not make a discreet disposition of her affairs herself, and that the will in question was devised by other persons, and only assented to by her upon being asked, without the power of understanding it, then they ought to find for the plaintiff;" that is, that it was not her will.

In *Boyd v. Eby* (8 Watts, 66), SERGEANT, J., in delivering the opinion of the court, says: "The great, broad; and intelligible question is, whether the mind was restored so as to be sound, whole, *compos*; or whether a portion of its thinking and judging powers, as connected with the subject of the will, remained mangled and perverted at the time of making the codicil, so as to leave it incapable of interfering with his former disposition of his estate, with judgment and discretion." In *Shropshire v. Reno* (5 J. J. Marsh., 91), ROBERTSON, Ch. J., observed that the facts in that case led the court to the opinion "that the testator had not a disposing mind; or that, if he ever had, it was not in a disposing state. He was not superannuated, nor was he absolutely *stultus* or *fatus*; but all the facts combined tend to show that he had not a sound memory, nor sufficient mind, nor a mind in a proper state for disposing of his estate with reason, or according to any fixed judgment or settled purpose of his own. This we consider the true test, established not only by philosophy, but by law." *Converse v. Converse* (21 Vermont, 168) lays down the rule, "that if the testator, when he made the will, was capable of knowing and understanding the nature of the business he was then engaged in, and the elements of which the will was composed, and the disposition of his property as

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therein provided for, both as to the property he meant to dispose of by his will and the persons to whom he meant to convey it, and the manner in which it was to be distributed between them, then he possessed a sound and disposing mind and memory." This rule was approved by REDFIELD, J., who added: "He must undoubtedly retain sufficient active memory to collect in his mind, without prompting, particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in relation to them." In 1828, Chancellor WALWORTH, in *Clarke v. Fisher* (1 Paige, 171), said: "The general principles in relation to the capacity of a person to make a will are well understood. He must be of sound and disposing mind and memory, so as to be capable of making a testamentary disposition of his property with sense and judgment in reference to the situation and amount of such property, and to the relative claims of different persons who are or might be the objects of his bounty." In that case the chancellor reversed the decision of the surrogate, which admitted the will of John Fisher to probate. The testamentary capacity of John Fisher was again the subject of a judicial investigation before Vice-chancellor Sandford, in 1845 and 1846 (3 Sandf. Ch., 351), and he held that he had testamentary capacity. This decree was reversed on appeal by the chancellor, who held the will void, and this court on appeal affirmed the decree of the chancellor (2 N. Y., [2 Comst.] 498). It is stated in a note by the reporter, that a majority of this court were of the opinion, upon all the facts, that the chancellor had properly set aside the will, but without passing upon the question as to the degree of mental capacity necessary to make a will, affirming the proposition that the testator in that case had not testamentary capacity. SHANKLAND, J., said: "That regarding as he did the cases of *Stewart v. Lispenard* (26 Wend., 255) and *Blanchard v. Nestle* (3 Den., 37) as fixing the standard of testable capacity at any point above that of the idiot and lunatic, the will can-

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not be declared void for the want of a sound disposing mind. The case of *Stewart v. Lispenard* has challenged much discussion in this State, and has not been regarded with favor by the bench or the bar. The circumstances under which it was heard and decided on the part of the court, are such as to carry with it little, if any, weight of authority. In that case, the will of a person conceded to be but a slight remove, in intellectual power, above an idiot was, by the decree of that court, directed to be admitted to probate. The argument of the case was commenced in that court on the 21st of December, 1841, and concluded on the 24th. On the 31st of that month, the last day of the official term of one-fourth of the senate, the case came up for decision, and was decided, with little opportunity for an examination of the facts, which the report says were contained in a voluminous case of upwards of 300 pages, and without the benefit of any written opinion, except that of Senator LIVINGSTON (and which has since been published), or any suggestions even from the judges of the Supreme Court;—the only justice of that court being present by courtesy to form a quorum, stating that he had no written opinion to present, not having had leisure, since the argument was closed, to digest the facts of the case, or even to read the numerous authorities which had been cited, amounting to nearly or quite a hundred cases, and he declined to deliver an opinion. Senator VERPLANCK orally stated his reasons for reversal, and thereupon the court, composed exclusively of senators, by a vote 12 to 6, reversed the decree of the chancellor, which affirmed the judgment of the circuit judge, who affirmed the decree of the surrogate refusing to admit the will to probate; and the court, by a vote of 11 to 8, made a decree directing the will to be admitted to probate. After the breaking up of the court, the learned opinions of two of the senators who voted to reverse the decree of the three courts below were published, and appear in our reports; but they must be regarded as containing the views of the distinguished senators, and not those of the court. We fully concur in what is said by Mr. Justice

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CLERKE in *Thompson v. Thompson* (21 Barb., 116), that "the opinions of these learned and distinguished senators in this case are not binding authority." It was not an inappropriate commentary upon this case to add, that subsequent to the decision of the Court of Errors, in an action of ejectment in the Superior Court of New York, before Chief-justice Oakley and a jury, the jury, under instructions from the court, found that this same Alice Lispenard was an idiot, and had no testamentary capacity, thus annulling this same will as to real estate. This verdict was rendered after a protracted investigation, and the examination of a large number of witnesses. *Blanchard v. Nestle* (3 Den., 37) was decided in the Supreme Court in 1846, and affirmed the doctrine of *Stewart v. Lispenard*, and mainly on the authority of that case, that mere imbecility of mind in a testator, however great, will not avail against his will, provided he be not an idiot or a lunatic. In *Stanton v. Weatherwax* (16 Barb., 259) the Supreme Court of the Fifth District reversed a judgment of the surrogate, in which he applied to the testator the rule in reference to idiots and imbeciles, as stated and illustrated in the Lispenard case. The court say, that "perhaps the unsoundness of the testator's mind extended to so many subjects, and perverted his judgment in relation to so many topics as to obscure and distort his entire mental faculties, and to amount to a general unsoundness of mind, which would entirely incapacitate him from making a rational or valid disposition of his property."

In *Newhouse v. Godwin* (17 Barb., 236), STRONG, J., thinks the rule established, referring to the Lispenard case, and *Blanchard v. Nestle*, that the wills of excessively weak persons,—and by those he says he means persons of the lowest degree of mental capacity, where there is a glimmer rather than light,—are to be sustained; and he says "we must submit to it, whatever may be our opinion as to its necessity, propriety, or expediency." This court, in two late cases under its consideration (*Buel v. McGregor*, and in the *Matter of the Will of Richard Ustick*), has not considered this rule

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as of obligatory force upon it, but has been disposed to give the language used in the statute its natural and obvious import and meaning. We have held that it is essential that the testator has sufficient capacity to comprehend perfectly the condition of his property, his relations to the persons who were, or should, or might have been the objects of his bounty, and the scope and bearing of the provisions of his will. He must, in the language of the cases, have sufficient active memory to collect in his mind, without prompting, the particulars or elements of the business to be transacted, and to hold them in his mind a sufficient length of time to perceive at least their obvious relations to each other, and be able to form some rational judgment in relation to them. A testator who has sufficient mental power to do these things is, within the meaning and intent of the Statute of Wills, a person of sound mind and memory, and is competent to dispose of his estate by will.

We are next to consider upon whom the law casts the burden of establishing the will of a deceased person. The party producing the paper, or the proponent of a will, makes the allegation that it is the will or the wish of a free and competent testator, and the *onus probandi* is upon the party propounding the alleged testamentary paper. The conscience of the court is to be satisfied by the party setting up the will, that it is the will of a free and capable testator. This clearly recognized rule is well expressed by PARKER, B., in delivering the judgment of the Judicial Committee of the Privy Council in *Barry v. Butlin* (1 *Curt.*, 637; 2 *Moore P. C.*, 480), where he says: "The rules of law, according to which cases of this nature are to be decided, do not admit of any dispute, and they have been acquiesced in on both sides. These rules are two: the first, the *onus probandi*, lies in every case upon the party propounding the will, and he must satisfy the conscience of the court that the instrument so propounded is the last will of a free and capable testator." Again: "In all cases, this *onus probandi* is imposed on the party propounding a will." In the late case of *Broming v. Budd* (6

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Moore P. C., 480), the same learned judge said: "Their lordships have to apply to the facts of the case the established rule on this subject laid down in *Parks v. Ollatt* (2 *Phil.*, 323), and fully explained in the case of *Barry v. Bullin* (2 *Moore P. C.*, 480), viz., that the burden of proof lies upon the party propounding a will, and that a court of probate is not to pronounce in its favor unless it is judicially satisfied that the instrument propounded is the last will of a free and capable testator."

In *Panton v. Williams* (2 *Curt.*, 530; 2 *Notes of Cases*, supplement, 21-29), certain papers propounded as the will and codicils of a party deceased, opposed on the grounds of forgery and fraud, were pronounced for by the Prerogative Court, but with great doubt and difficulty. That sentence was reversed by the judicial committee of the Privy Council, further evidence having been admitted. Lord BROUGHAM, in delivering the opinion (2 *Notes of Cases*, supplement, 29), said: "It is of itself not immaterial to consider that the contention of those who are setting up these papers is incumbered with so much difficulty; for whether the question arises between a will and an alleged intestacy, or, as in the present case, between one will and another of a prior date, the proof being upon the party propounding any testamentary writing, the course of administration directed by the law is to prevail against him who cannot satisfy the conscience of the court of probate that he has established a will, or the prior instrument which is liable to no doubt, is to be established in preference to the posterior one, which cannot be so proved to speak the testator's intentions, as to leave the court in no doubt that it declares those intentions. There is no duty cast upon the court to strain after probate, and to grant it where grave doubts remain wholly unremoved, and great difficulties oppose themselves to our progress, which we are quite unable to surmount." Again, he says: "It may suffice to say, that the proof eminently lies on him who sets up a will; and further, that it is more fatal than to his adversary if he leaves difficulties entirely without explanations." He adds:

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"It is much less material that those who seek to impeach a testamentary instrument should be unable to explain certain things in their case, and should be forced to admit that their argument is not in every point consistent with all the facts, than that they, who seek to establish the will, should give no rational, consistent, or intelligible solution of those difficulties which incumber their suppositions, and obstruct the path towards the conclusion they would have us arrive at. . . . We are of the opinion that grave suspicions rest upon material parts of the case, which it was necessary should be removed before probate could be given, and that they have not been removed; that the testimony of the witnesses relied upon does not counteract the weight which the undoubted facts of the transaction fling into the other scale—nay, that there is no great difficulty in reconciling much of that testimony, indeed all its most important portion, with the undisputed facts to which, upon a superficial view, it might seem repugnant."

In *Baker v. Batt* (2 Moore P. C., 317), PARKE, B., said: "No rule has been acted upon in the court below which has not been long observed, not only in the ecclesiastical courts, but those of common law. . . . For if the party upon whom the burden of the proof of any fact lies, either upon his own case, where there is no conflicting testimony, or upon the balance of evidence, fails to satisfy the tribunal of the truth of the proposition which he has to maintain, he must fail in his suit, and that in a court of probate where the *onus probandi* most undoubtedly lies upon the party propounding the will, if the conscience of the judge, upon a careful and accurate consideration of all the evidence on both sides, is not judicially satisfied that the paper in question does contain the last will and testament of the deceased, the court is bound to pronounce its opinion, that the instrument is not entitled to probate; and it may frequently happen that this may be the result of an inquiry, in cases of doubtful competency in particular, without the imputation of wilful perjury on either side; or it may be, the judge may not be satisfied on which side the perjury is committed, or whether it certainly exists."

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The same rule is distinctly recognized and enunciated by the Supreme Court of Massachusetts, in *Crowninshield v. Crowninshield* (2 Gray, 526). It was there held, in accordance with the universal rule, that the burden of proving the sanity of the testator is upon him who offers the will for probate, and this burden does not shift upon evidence of his sanity being given by the subscribing witnesses. THOMAS, J., in an able and learned opinion, says: "When one dies owning real and personal estate, the law fixes its descent and distribution. Under certain conditions, however, it gives to such owner the power to make a disposition of his property, to take effect after his death. This is done by a last will and testament. To make such will, certain capacities are requisite in the maker, and certain formalities for its due execution. When, therefore, a will is offered for probate, to establish it, to entitle it to such probate, it must be shown that the supposed testator had the requisite legal capacities to make the will; to wit, that he was of full age and of sound mind, and that in making it the requisite formalities have been observed. The heirs-at-law rest securely upon the statutes of descent and distributions until some legal act has been done by which their rights under the statutes have been lost or impaired. . . . Upon whom, then, is the affirmative? The party offering the will for probate says in effect, This instrument was executed with the requisite formalities, by one of full age and of sound mind,—and he must prove it; and this is to be done, not by showing merely that the testament was in writing—that it bears the signature of the deceased, and that it was attested in his presence by three witnesses; but also that it was signed by one capable of being a testator, one to whom the law had given the power of making disposition of his property by will." The learned judge further adds: "There are strong reasons why the same presumption as to sanity should not attach to wills as to deeds in ordinary contracts. Wills are supposed to be made *in extremis*. In point of fact, a large proportion of them are made when the mind is to some extent enfeebled by sickness or old age. It

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is for this reason that the execution of the will and the proof of its execution are invested with more solemnity, the statute requiring it to be attested by three or more competent witnesses; making void all beneficial devises, legacies, or gifts to such interested witnesses, and requiring the presence of the three in probate court for its proof." In conclusion, he says: "On the whole matter, we are of opinion that where a will is offered for probate, the burden of proof in this commonwealth is on the executor or other persons seeking probate, to show that the testator was, at the time of its execution, of sound mind; that if the general presumption of sanity applicable to other contracts is to be applied to wills, it does not change the burden of proof; that the burden of proof does not shift in the progress of the trial, the issue throughout being one and the same; and that if, upon the whole evidence, it is left uncertain whether the testator was of sound mind or not, then it is left uncertain whether there was under the statute a person capable of making the will, and the will cannot be proved."

We have quoted thus largely from this opinion, for the reason that it is, to our mind, one of the most able and satisfactory upon the points under consideration in this case with which we have met. It is most carefully considered, ably reasoned, and fully sustained by authority. Its results command our entire assent. (See, also, *Quick v. Mason*, 22 Maine, 438; *Cilley v. Cilley*, 34 Id., 162; *Wallis v. Hodgson*, 2 Atk., 56; 1 *Powell on Devises*, Jarman's ed., 81; *Newhouse v. Godwin*, *supra*; *Clarke v. Sawyer*, *supra*.) In this connection, it may be well to add a few remarks from the opinion of Mr. Justice ERSKINE, in the case of *Harwood v. Baker* (3 Moore P. C., 382). They are in point, and lay down with accuracy the principles which should govern us in the examination of the evidence in this cause. He says: "Keeping in mind the principle, that in all cases the party propounding the will is bound to prove to the satisfaction of the court that the paper in question does contain the last will and testament of the deceased, and that this obligation is more especially

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cast upon him when the evidence in the case shows that the mind of the testator was generally, about the time of the execution, incompetent to the exertion required for such a purpose; and further, keeping in mind that the disposition in question was not in accordance with any purpose deliberately formed before his mind became enfeebled by disease, we come to the examination of the witnesses whose evidence is relied on as proving that at the time of executing the will in question, he was fully competent to form, and did deliberately form, the intention of leaving to his wife the whole of his property."

It seems to us that these cases fully establish the following propositions:

1. That in all cases the party propounding the will is bound to prove to the satisfaction of the court that the paper in question does declare the will of the deceased; and that the supposed testator was, at the time of making and publishing the document propounded as his will, of sound and disposing mind and memory.

2. That this burden is not shifted during the progress of the trial, and is not removed by proof of the *factum* of the will, and the testamentary competency by the attesting witnesses, but remains with the party setting up the will.

3. That if, upon a careful and accurate consideration of all the evidence on both sides, the conscience of the court is not judicially satisfied that the paper in question does contain the last will of the deceased, the court is bound to pronounce its opinion that the instrument is not entitled to probate.

4. That when it is sought to establish a posterior will, to overthrow a prior one made by the testator in health, and under circumstances of deliberation and care, and which is free from all suspicion, and when the subsequent will was made in enfeebled health, and in hostility to the provisions of the first one; in such case the prior will is to prevail, unless he who sets up the subsequent one can satisfy the conscience of the court of probate that he has established a will. And also the prior will is to prevail, unless the subsequent

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one is so proven to speak the testator's intentions, as to leave no doubt that it does so speak them,

5. That it is not the duty of the court to strain after probate, nor in any case to grant it, where grave doubts remain unremoved, and great difficulties oppose themselves to so doing.

6. That the heirs of a deceased person can rest securely upon the statutes of descents and distributions, and that the rights thus secured to them can only be divested by those claiming under a will and in hostility to them, by showing that the will was executed with the formalities required by law, and by a testator possessing a sound and disposing mind and memory.

The maxim, *Qui se scripsit heredem*, has imposed by law an additional burden on those claiming to establish a will under circumstances which call for the application of that rule, and the court in such a case justly requires proof of a more clear and satisfactory character. Such a condition is exhibited by the testimony in the present case. The two codicils under consideration were exclusively for the benefit of Mrs. Parish, with the exception of the charitable gifts; and although they were not actually written by her, yet they were drawn up at her suggestion, upon her procurement, and by counsel employed by her. She prepared and gave the instructions for them, and in judgment of law they must be regarded as written by herself: *Facit per alium, facit per se*. The rule which should govern the court in such a case is enunciated in *Barry v. Butlin* (1 Curt., 637). It is there said, that if a party writes or prepares a will under which he takes a benefit, that it is a circumstance which ought generally to excite the suspicion of the court, and calls upon it to be vigilant and jealous in examining the evidence in support of the instrument, in favor of which it ought not to pronounce unless the suspicion is removed, and it is judicially satisfied that the paper propounded does express the true will of the deceased. By the civil law such a will was rendered void, and it may be well doubted whether we have

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acted wisely in departing from its just and rational provisions in this respect; and it is well said by the court, in *Crispell v. Dubois* (4 Barb., 393), that, though this rule of the civil law has not been adopted in our courts, yet they do demand satisfactory proof in such cases that the party executing the will clearly understood and freely intended to make that disposition of his property which the instrument purports to direct. The doctrine is well stated in *Parke v. Ollatt* (2 Phill., 323), that "where a person who prepares the instrument and conducts the execution of it, is himself an interested person, propriety and delicacy would infer that he should not conduct the transaction."

In this case, conceding that Mr. Parish had some mind, it must also be conceded that it was greatly enfeebled; and it is undeniable that he was very much in the power of those by whom he was surrounded, unable to communicate except by their aid and through their interpretation, and in answer to questions which they saw fit to make, and by assenting to or dissenting from such suggestions as were made to him. Mrs. Parish was for all purposes his only channel of communication, and his sole interpreter, and the only person from whom all suggestions fruitful of results came; and it follows, conceding she might not have been the actual scrivener, or even not the employer as principal of the scrivener, that the same rule should apply as in cases when the scribe is the chief beneficiary under the will. The reason of this rule would require that these codicils should be fortified and supported to the same extent, and in the same way, as if she had drawn them herself.

Having, as we think, distinctly and satisfactorily ascertained the principles of law which should govern courts in the determination of testamentary cases, and which we have been thus careful to announce as safeguards for the protection of the community, we now proceed to the application of those principles to the testimony in the present case. Such an examination must necessarily in this discussion be confined to its more salient parts. The testimony occupies three octavo

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volumes, and a brief reference to that portion of it deemed the most significant is all that can be done here. We shall now regard this court for the purpose of such investigation, as sitting as the primary tribunal, before which the application may be considered as pending, to admit to probate the two codicils in controversy. If it shall be found that the testimony is of such a character that no doubt remains that the two papers propounded express the will of a free and capable testator, then the codicils must be admitted to probate. If, however, the conscience of the court, upon a careful and accurate consideration of all the evidence on both sides, is not judicially satisfied that the papers in question do contain the last will and testament of the deceased, the court is bound to pronounce its opinion that the instruments are not entitled to probate.

It is impossible, within any reasonable or practicable limits, to review in detail the mass of testimony taken in the present case. A very large portion of it is occupied with the opinions of many highly intelligent and respectable gentlemen, having more or less opportunities for observation of the mental vigor of Mr. Parish after his attack, and their conviction that he understood what was said to him, by signs and gestures, and in some instances by the use, as they understood him, of the monosyllables "yes" and "no," thereby communicating his thoughts and wishes to those around him. Opinions of witnesses, however respectable, can only have weight and value when accompanied with the facts upon which they are based, and, having the facts, it is for the jury, or the tribunal called upon to scan and consider the testimony, to see if the conclusions and opinions of the witnesses are sustained by the facts detailed by them. Opinions without facts are of but little importance. (*Clarke v. Sawyer*, 3 *Sandf. Ch.*, 351; *Cilley v. Cilley*, *supra*; *De Witt v. Barly*, 17 *N. Y.* [3 *Smith*], 340.)

We shall advert only to such portions of the testimony as have impressed our minds as of peculiar significance, and have led us irresistibly to the conclusions at which we have

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arrived. Before doing this, however, it is well to consider for a moment the condition in life, the associations, and social position of Mr. Parish previous to the attack in July, 1849. We have a full and minute account of his life from his youth upward. It seems to have been peculiarly blameless and free from reproach. The breath of scandal never tarnished his fair name, and his conduct seems to have been in the highest degree circumspect, and such as became a gentleman of the most fastidious tastes and refined associations. In 1829, occupying then a high social position, and having accumulated a fortune which was then deemed ample and large, he was married to Miss Susan Maria Delafield. She was an accomplished lady, moving in the highest social circles of the city, and of a family distinguished by the intellectual vigor of its members, and by the high professional position of her distinguished brothers. To this circle Mr. Parish was welcomed with cordiality and affection. It is proven in the case that her mother loved him as a son, and her brothers regarded him as a brother. For twenty years Mr. Parish lived and moved in this circle and with these associations, "*sans peur et sans reproche*." He gained upon the affections and the respect of his wife's family, and its members seem to have been his most intimate friends and constant associates; and their friendship and attachment to him were apparently never weakened, but greatly strengthened. His house was the abode of hospitality, and at his table and at his feasts were gathered the most refined, polite, and intellectual of New York society. Mr. Kernochan, his life-long associate and intimate friend, his almost daily companion from boyhood until the hour of his death; with better and fuller opportunities of knowing him than any other man (except perhaps his brother Daniel), and most competent from his intelligence and acquaintance with men to form an accurate and reliable judgment, says of him, "he was the most placid and unexcitable man I ever knew, of great self-respect, and great command of temper." Dr. Delafield says, "he was of studious courtesy and propriety of demeanor."

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Col. Richard Delafield says, "his manners were mild, gentle, and unruffled." Mr. Henry Delafield, who knew him intimately, from residing part of every year in the same house with him for twenty years, says "he was exceeding affable and courteous." And Dr. Taylor, the eminent rector of Grace Church, where Mr. Parish constantly worshipped for more than twenty years, and who was on terms of intimate association with him, says: "His conduct was marked most decidedly by great self-respect and strict observance of decorum, and, in his intercourse with others, great courtesy and affability of manner." This was the daily walk and carriage, and such the estimate of the gentlemanly bearing of Henry Parish, up to July 19, 1849.

How utterly changed did he become after that day, is conclusively established by the uncontradicted testimony of many witnesses. We shall only advert to a few of the most remarkable and striking incidents, indicating unmistakably the total transmutation, from that day, of his character and habits. The review is painful and would willingly be omitted. In the view we take of this case, it is quite controlling, and it cannot therefore be avoided. The facts narrated show the changed man, and the inferences to be drawn from them are conclusive. In March, 1850, as related by Dr. Taylor, this scene occurred at Mr. Parish's house after he had administered the communion to Mr. and Mrs. Parish and their attendant Mary Ann Greene. As Dr. Taylor was going away, Mrs. Parish took out of her pocket three gold pieces of \$5 each, and handed them to Mr. Parish to be given by him to Dr. Taylor. Then "Mr. Parish evinced strong displeasure by his looks and contemptuous mode of expression, frowning, and saying 'yah, yah, yah,' shaking his head at Mrs. Parish, scolding in his way, and refusing to hand" Dr. Taylor the money. She smiled and said, "give it to the doctor." He threw the money back to her, it fell on the floor—she picked it up and gave it to the doctor, and he left.

The interview between Mr. Parish and Mr. Daniel Parish at the house in December, 1850, furnishes another striking

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illustration of the change in Mr. Parish's manners and character. The testimony clearly shows that the brothers Henry and Daniel had ever lived together on terms of more than ordinary fraternal intimacy. Daniel was the younger brother, and had, in early life, been taken from home by him, and associated with him in business, and had thus opened up to him his subsequent laudable career. We cannot see that any cloud had ever obscured their friendly regard for each other, and as their natures seem to have been peculiarly undemonstrative, we have but few evidences of outward manifestations of their interest in, or affection for each other, except as we gather them from circumstances. We cannot fail to see, however, underneath a calm and unruffled exterior, a deep current of warm affection for each other, and Henry manifested this feeling towards his brother Daniel on many marked occasions. His sympathy for his brother, at the period of his pecuniary losses, and the delicate and inoffensive way in which Henry contributed from his own means to repair them, may be cited as evidences of his warm feelings for and interest in Daniel and his family. We see no reliable evidence in the case, that any change was ever wrought in Mr. Henry Parish's mind towards his brother. The trifling incidents referred to as causes for the suggested change of sentiment, are wholly inadequate to produce such a result. It is incontrovertible that Mrs. Parish, for some cause, had certainly not the most friendly feelings towards Mr. Daniel Parish. If she had formed the designs attributed to her, it is not unnatural that she should have desired to exclude Mr. Daniel Parish from the society and house of her husband, that she should have received, with distrust and suspicion, his every act of omission or commission, and she should have hoped and expected that her husband would have participated in and sympathized with her in her animosity to Mr. Daniel Parish. It is upon this hypothesis that we may credit the testimony of Quin that, on the next day after Mr. Parish's attack, she gave orders to exclude from the house Daniel Parish and the members of his family.

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That such exclusion did actually take place is uncontradicted. No mention was made as to James Parish, and the reason may be that, as he lived in the country and was partially blind and not in the habit of visiting the city, it was supposed no effort would be made by him to see his brother, and any attempt to exclude him was uncalled for. It is certain that he did not visit his brother Henry, and whether his failure to do so was prompted by knowledge of the exclusion of his brother Daniel, and the natural inference that he would also be excluded, or from inability to travel, does not appear. There is no evidence in the case of any expression of dissatisfaction towards him by Mr. Henry Parish on account of such omission, or any exhibition of unfriendly feeling towards him or his family, if we except the wish said to have been expressed by Mr. Parish, as interpreted by Mrs. Parish to Mr. Lord, that he desired to revoke the legacies to the children of James.

In this place it may be well to remark upon the interviews, and the only ones had by Mr. Daniel Parish with his brother after his attack. The first one was about the 20th of August, 1849, as near as it can be stated from the testimony; when, on calling at the house to inquire as to the condition of his brother, Quin, the waiter, let him in, having heard the doctor say that his brother was "very low, he was afraid he would do no good." Quin, thinking he would not live, told Mr. Daniel Parish, in disobedience of his instructions, "to go right up and see his brother now, that when he would call again he would not see him alive." Mr. Parish proceeded immediately to his brother's sick-room, and, as he was about entering, he met Mrs. Parish, who objected to his going in, saying "he was not in a condition to be seen." He went in, notwithstanding, and this first interview of the brothers would seem to have been of the most friendly character on the part of both. A servant was sent into the room to report to Mrs. Parish what Mr. Daniel Parish was doing there, and he saw him (Daniel) "having hold of his brother in the bed by his hand." There is no evidence that Mr. Henry Parish

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evinced any displeasure at this visit. When Mr. Daniel Parish left the house, Mrs. Parish gave instructions to Quin "to be particular not to let him in again." About the middle of October, 1849, Mr. Parish was very feeble, and Dr. Taylor thought it very probable that he would shortly die. On the 16th, Mr. Daniel Parish called to see him, and was admitted by Mrs. Parish, and if he then saw his brother, which is left by the testimony in some doubt, this was the second interview. We have no statement of what occurred (if it took place), and only know it was short. This may be well supposed, as it was expected Mr. Parish would not long survive. On the 8th of January following, Mr. Henry Parish was driven down to the office, where for many years he and his brother and their partners had transacted business, and then Daniel Parish came up to him, shook hands with him, and said: "How do you do, Henry?" There is no evidence on this occasion that Mr. Parish evinced any unfriendly or hostile feeling to his brother Daniel. Between this period and May 1, 1850 (from the testimony, the latter part of January), Henry Parish again visited the counting-house in Water-street, and met there his brother Daniel. He came forward and shook hands with his brother Henry, and inquired after his health. There is no evidence of any unfriendly feeling exhibited on this occasion by Henry Parish to his brother. About the last of February, 1850, Henry Parish was severely attacked with a convulsion, and Dr. Delafield, his physician, deeming his condition alarming, and considering his recovery to be nearly hopeless, it would appear, without consulting Mrs. Parish, dispatched a messenger immediately for his brother Daniel. What transpired on the occasion of this visit, does not appear. Daniel Parish, on his return from Europe in November or December, 1850, calls on his brother Henry with his two daughters, was kindly received by him, and went with him into the drawing-room. While there, Mrs. Parish came in, and soon evinced her displeasure at the presence there of Mr. Daniel Parish, and ordered him to leave the house. This is the last time Henry and Daniel

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ever met, and, so far from Henry exhibiting any unkind feeling towards Daniel in any of these interviews, it is shown that he evinced the utmost excitement and anger towards his wife, for her apparent harsh and unkind treatment of him on the occasion of this last visit. The case is, therefore, without a scintilla of evidence that Henry Parish, on any occasion, gave expression to any hostility to his brother Daniel, or of any change of feeling towards him.

We resume the narration of acts and conduct of Mr. Henry Parish. At the interview at the house in the latter part of 1850, just referred to, Henry Parish manifestly thought that Mrs. Parish was treating his brother with rudeness and impropriety, if he had mind to comprehend what was transpiring; at any rate, he saw something was going on offensive to him, and that Mrs. Parish's manner to Daniel was unfriendly and harsh. If he could understand what was said, he heard her order his brother to leave *her* house, and saw her follow him down stairs, as if intending herself to see that he promptly obeyed her commands. At this, Henry Parish became greatly excited, and the witness, his attendant at the time, says: "Mr. Henry Parish got quite outrageous in my hands. Mr. Parish had his crutch; he raised it with the intention of hitting Mrs. Parish, who stood in the front hall; just as he raised his crutch, I swung him round from the right side, and got him into the dining-room." It is not a little extraordinary that, if Henry Parish then entertained towards his brother Daniel the unfriendly and hostile sentiments now alleged and claimed, and if he heard and understood all that was transpiring, he should not have sought to inflict chastisement *upon that brother*, whom, on this hypothesis, he must have greatly disliked, if not hated, and who had in his presence insulted his wife; rather than *upon her*, the advocate and avenger of *his* wrongs, and the object of contumely on his account.

Again we have a striking illustration of Mr. Parish's condition, from the statement of Austin, the poulterer at Washington market. What transpired there is referred to in

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another connection, and need not be here detailed. Mr. Parish was sent almost daily, with an attendant, to a market in the vicinity of his residence, not, it would appear, for the purpose of making purchases, but to amuse him and occupy his time. He does not seem to have had an intelligent object in going, nor did Mrs. Parish or his attendant, or the persons at the market, pay much heed to what he did or was supposed to communicate. This attendant, in 1850 and 1851, in describing his daily habits, says: "Mr. Parish would take the game and put it to his mouth, the same as he did his pants." The extraordinary proceedings in the carriage, as detailed by the coachman, Clark, when he threatened the demolition of the carriage-windows because he was not taken down town, and the noise and commotion created in the street, and which was quieted by the shallow and successful trick of Clark to deceive him, and make him believe he had been down town, when, in fact, he had only driven him a short distance and back, are quite inharmonious with any thing developed in his character prior to the attack. The melancholy exhibition at Buchanan's flower-garden, as detailed by Clark, shows the changed man, and the forgetfulness of the gentleman, and the habits of the imbecile. His inability to control the calls of nature is a marked and prominent fact in this case, and such inability has ever been regarded as a distinguishing evidence of the loss of mental power. On this occasion such absence of control was peculiarly offensive and improper, and no sense of shame, mortification, or of regret, seems to have been produced in him by the occurrence. Mrs. Parish was excited, and found fault with the attendants. They thought to justify themselves by throwing the whole blame on Mr. Parish, and he at length became excited also. Clark says: "He made noises and sounds both, but I disremember what they were. I wasn't looking him over my shoulder at all, but I heard him hollowing and bawling." As an evidence of the total insensibility of Mr. Parish to all the decencies and proprieties of life, a simple reference to his condition of nudity, in rushing into

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the presence of his wife and seeking her garments for him, and, in this condition, sinking in exhaustion from excitement on the floor, will suffice. He had to be raised from it by Mrs. Parish and the servants. His search for his garments, in the place appropriated for hers, occurred five or six times. The scenes which daily transpired, as detailed by Clark, one of his attendants, while Mr. Parish occupied the room on the ground-floor, fronting on 17th-street, are of the same general character. He says: "In the morning, when I would be dressing (meaning Mr. Parish), he wished to have the windows open, would sign to have the blinds and all open; he would look that way out, and I would say, 'It is wrong for you to expose yourself against the windows.' He would say then, 'Yanne, yanne, yanne,' raising his hand that it should open, shaking his head; the windows then couldn't be shut, Mrs. Parish insisting they should be kept shut. Mrs. Parish came several mornings to shut them herself. Mr. Parish would shake his head this way, and would not have it, raising his left hand and moving it towards the windows as if to have them opened, saying, 'Neay, neay, neay.' Then Mrs. Parish by-and-by came in again, and drew over the curtains behind Mr. Parish's back, to keep the people from looking in. Then Mr. Parish by-and-by turns round his head, and sees the curtains drawn, and has them opened again in the same way. Then Mrs. Parish comes and says to him, 'Mr. Parish, won't you keep them shut?' he then lifted up his hand and gave Mrs. Parish a drive, saying, 'Neay, neay, neay,' as if to put her away from him."

On a cold winter's night the following occurrence took place. The witness says Mr. Parish was sitting in the library with Mr. Delafield and Mrs. Parish. "He seemed to be very weary and unhappy in his mind, and I was sent for and took him by the arm, and went out into the front hall. He was determined apparently to go out, and I told Mrs. Parish: she came out into the hall with his hat, and put it on his head, and said, if he was going out he had better have his hat on. He raised his left hand and threw his hat right off

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his head in the hall, and we went out the front door, and Mrs. Parish closed both doors after us, and shut us out, as it was a very cold winter's night, and she did not wish to have the doors open. There had been some men working in front of the house during the daytime, and there was a very large hole about four and a half feet deep or thereabouts, to the right-hand side of the front door, and that is the very place to which Mr. Parish wanted to go. I caught hold of Mr. Parish by the collar of the coat, and told him I would not let him go one foot further. He held very much against me; I told him of the danger we both were in—falling into this hole. It was covered over with boards, and I was standing upon two of them at the time. I got Mr. Parish turned back to the front door, and rung the bell, and got Mr. Parish into the library. I then told Mrs. Parish, in the presence of Mr. Delafield, what had happened. I don't know that there was any answer." One other incident ought not in this connection to be omitted. It is detailed by Mr. Campbell, a witness in no way connected with any of the parties in these causes, and without bias or prejudice of any kind. It is the attempt of Mr. Parish to climb the leader in front of his own mansion, facing Union Square. It is detailed in vol. iii., fols. 1875-82. Mr. Parish did not succeed in the enterprise, and but for the interference of Mrs. Parish and his nurse, who forcibly removed him into the house, the consequences to him might have been most serious. This was in 1852. He was compelled to abandon the effort by physical force, which he struggled in vain to resist. It cannot be necessary to refer in this connection to the numerous eccentricities of Mr. Parish during the period of his mental weakness and obscurity intervening between the date of his attack and his death. Reference need only be made to the many instances when he was guilty of the indecorum and gross rudeness of assaults upon and threats to Mrs. Parish, a lady entitled to, and who had on all occasions prior to his prostration, received from him the most marked and distinguished courtesy.

And can this be the same gentleman of whom Col. Dela-

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field says that, prior to July, 1849, he was mild, gentle, unruffled, yet decided in all matters to which he gave his personal attention? Mr. Kernochan, his friend and associate, says of him in respect to the same period: "Mr. Parish was certainly a high-minded gentleman, and would never do any act unbecoming a gentleman; he had a great deal of self-respect, and great command of temper. I never knew him to do any thing under excitement." As these two witnesses describe Henry Parish, such beyond all doubt and controversy he was anterior to July 19th, 1849; and from the testimony already referred to, we see what the same individual was after that date, and up to the period of his death. How entire and complete is the change! How diametrically opposite to the previous conduct of his whole life is that now exhibited. And the inquiry forces itself upon the mind, What cause has produced such results? Can such totally inconsistent and opposite characters be reconciled with the theory that the faculties, the mind, the moral perceptions of Mr. Parish underwent no change, but were the same after July 19th, 1849, as they were before that day? That after that period his reason was unclouded, and that his intelligence was undimmed? That he understood all that was said to him, comprehended the relations of things, and was in the full possession of all his intellectual powers?

We confess ourselves wholly unable to assent to any such theory. The conviction on our mind is clear that these facts and circumstances show unerringly, that the attack of July 19th obliterated the mental powers, the moral perceptions, the refined and gentle susceptibilities of Henry Parish; that after that period he ceased to be the mild, intelligent, and unruffled man he had been theretofore, and that thereafter he was not morally responsible for the unbecoming and ungentlemanly conduct he so frequently exhibited. *He then ceased to be Henry Parish, and was no longer an accountable being.* We find much less difficulty in reconciling our minds to this view of the case than to adopt the theory of the proponents, that Mr. Parish, up to the period of his death, pos-

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sessed an unclouded intellect, retaining its pristine vigor and activity, was conscious of all that was transpiring around him, and understood all that was said to him; comprehended the minute details of the complicated and important business transacted for seven years in his name, and often in his presence, and was capable of communicating, and did communicate his thoughts and wishes to others. It is much easier for us to believe that those who, we doubt not, honestly think that Mr. Parish understood what was said to him, and that they comprehended the operations of his mind and the expression of his wishes, are mistaken in their suppositions, than to reconcile his actions after his attack with the fact that he was still in possession of all his mental faculties.

When the means of arriving at the knowledge whether Mr. Parish was understood or not are examined, it will be found that they were very imperfect, and very liable to misapprehension. It is to be observed, also, that all who speak on this subject applied no test to determine the accuracy of their impressions. They saw Mr. Parish mainly when in apparent good physical health, and visited him under the impression and with the preconceived idea that he understood what was said to him, and they naturally construed the signs and gestures made by him as indications of intelligence, and responsive to suggestions made by them. But the accustomed mode of conveying thought by speech was denied to Mr. Parish. Some of the witnesses think he made use of the words "Yes" and "No," and one or two other words; but the weight of the testimony greatly preponderates in favor of the position that, after his attack, he never uttered an intelligible word. This is the testimony of Mr. Kernochan, who saw him more frequently than any person other than the members of his family. Mr. John Ward, whose intercourse with him was very frequent, says distinctly that he never heard him utter a distinct and intelligible word after his attack. He was therefore denied the usual manner of communicating his thoughts and wishes. What remained were signs and gestures, and the expressions of his face, to com-

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municate with those around him. Some of the witnesses suppose that they obtained his meaning by the expression of his face. Now it is to be remembered that the only agents conveying such expressions are the mouth and the eyes. Mr. Parish had no use whatever of the former organ for this purpose. His face was always peculiarly unimpressive and undemonstrative, but after his attacks, the muscles of his mouth became firm and rigid. His eyes afforded but little aid in this particular. He had nearly lost the sight of one of them, and the other was opaque by the operation of cataract, and both were generally covered by spectacles of great convexity. He could, therefore, neither speak nor use the muscles of his face to give expression to his thoughts, and the gestures made by him with the left hand and its fingers were irregular, unmeaning, and contradictory, and often conceded to be misunderstood.

With these imperfect and uncertain media for ascertaining the thoughts of Mr. Parish, it is doing no injustice to any one to assume that they have been mistaken in supposing that they correctly understood him. We more naturally and readily come to this result, because we find that all who had any intercourse with Mr. Parish, on many occasions, found great difficulty in understanding his wishes and thoughts, if they even understood them at all; and the instances are frequent and clearly established where he often made an affirmative and negative motion of his head immediately succeeding each other, to the same question, leaving the inquirer in perplexity which he really intended. The testimony is conclusive that Mrs. Parish herself frequently acknowledged that she could not understand him, and there is some testimony tending to show that, on some occasions at least, she thought he did not at all understand what was said to him, and that, in her opinion, the effort would be useless to make him understand.

As an illustration. In the interview with Austin at the Washington market, a man well acquainted with Mr. Parish, and who had dealt with him for years, he said to Mrs. Par-

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ish, "I would like to see him (Mr. Parish, who was then sitting in the carriage outside the market)—I will take him out something that he will like. I showed her the articles I was going to take out. She told me not to take the canvas-backs, but to take the red-heads, as he could not tell the difference: and woodcock I had; she said they were too high—to carry him some snipe, that would come cheaper. I took them to his carriage, and spoke to him. He looked at me, after speaking to him two or three times. I held up in my hands the birds, for him to pick out what he wanted. He took his cane, and flurried it around, and scared me. I stepped back from the carriage door. I then stepped up, and tried to make him understand me, and I went into the market again. Mrs. Parish bought what she saw fit." It is not a little difficult to see, if Mr. Parish was in full possession of his mental faculties, why he could not tell the difference between canvas-back ducks and red-heads as well as Mrs. Parish. It is apparent from the testimony, that Austin had selected canvas-backs to take out to Mr. Parish, and that, by Mrs. Parish's direction, they were changed for the red-heads. She must therefore be undoubtedly correct, if the views we entertain of Mr. Parish's mental condition be sound, in saying that Mr. Parish did not "understand the difference," for it is clear from Austin's testimony that he did not understand any thing about the object of the visit to the market, or what Austin meant by exhibiting game to him. It would seem, if he understood any thing about it, and had any idea on the subject, he supposed such exhibition was either to ridicule or insult him. When Mr. Parish went through the ceremony of going himself to the market, in the vicinity of his own house, Simmons, his attendant, says "the butcher asked me what Mr. Parish wanted. I told the butcher what I heard Mrs. Parish tell the cook, and he would send it home." Wingrove, another attendant, says, "Mr. Parish would never point to any thing in the store that he wanted." Mr. Case, the butcher and keeper of the market, says, "Mr. Parish was brought to the market, by his attendant, and he would sit him down in a

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chair; he never could tell when he was through; he would sit there till the waiter would take him away. Mrs. Parish told him (Case) that he must not send the articles Mr. Parish had indicated by motions and gestures he wanted, for Mr. Parish did not know what he wanted." This witness further said, he "never could find out rightly what Mr. Parish wanted."

Numerous other witnesses who have testified in this case, on both sides, say that on many occasions Mr. Parish could not be understood. Mr. Charles A. Davis says: "I have stopped my inquiries endeavoring to find out his meaning; Mrs. Parish failed to find it out." Folsom, long Mr. Parish's confidential clerk, says: "I failed to find out what he wanted." Wingrove, one of his attendants, says: "I never found out what he wanted, searching for his clothes, nor why he put his clothes and game to his mouth. Neither myself nor Mrs. Parish could find out where he wanted to drive; neither what part of the newspaper he wanted read. That Mrs. Parish often, after making repeated efforts to understand him, gave it up." Simmons, another of his attendants, says: "I could not ascertain his wishes from his motions, sounds, or gestures." James Clark, another attendant, says: "I and Mrs. Parish would spend an hour or two, and fail to get his meaning." Dr. Delafield, his physician, gives a long description of his attempts and failures to understand Mr. Parish. Rev. Dr. Taylor, when he proposed first to administer the communion to him, could not understand why he did not wish it done. Mr. Tileston, president of the Phoenix Bank, says that Mrs. Parish stated to him, on the occasion of the interview between him and Mr. Parish, in her presence, that "she was entirely unable to convey or understand what Mr. Parish meant." This was in December, 1853. He adds, that he "could not understand him in any way." Dr. Wheaton, a medical man, and intimate friend of Mr. Parish, says he "could not interpret at all his meaning, without aid from Mrs. Parish." Fisher, another of his attendants, says: "That in August, 1849, Mrs. Parish could not understand him, and Mr. Parish gave up in despair the effort to make

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her, and was in consequence troubled all day that she could not find out what he wanted." That he, Fisher, "sometimes failed entirely to make out his meaning." Brown, an attendant, tried three days to find out his meaning, and failed many times to do so. Nichols, the carpenter, could not find out what he wanted done. Mr. Grinnell could not understand what he meant about investing money. Dr. Markoe, one of his physicians, says: "Two or three times I failed to get at his meaning; occasionally failed altogether." He also said: "Mr. Parish had no power to say he wanted to destroy a will; he had not the power to say any thing; could express no thought except by asking questions." All the testimony shows that he could only indicate with his fingers and hand, or by sounds, that he wanted something, or that something was the matter, and which motions or sounds were construed by those around him as evidences of his wish to put a question, whereupon they began to suggest various topics, and when they thought they perceived that they had hit upon the subject in his mind they supposed he wished to inquire about, they put such questions as suggested themselves to them, and to which they supposed they had received affirmative or negative answers. If Mr. Parish had no power to express a wish to destroy a will, it follows he had none to create one, and the manifestation of his wishes depended entirely upon the interpreter, and the integrity of the interpretation. Henry Delafield, who occupied the house with him, says, that as to ordinary affairs, he frequently failed to ascertain his meaning. Jones, the tailor, could not understand what he wanted as to his clothes, even with Mrs. Parish's aid. She could not understand him; he nodded his head, and immediately after changed to the shake of it. Mr. Gasquet, his old friend and partner, could not understand at all what he meant. Mr. Ogden, the Cashier of the Phoenix Bank, where Mr. Parish for years had been a director, and who knew him well, in an interview at the bank with Mr. Parish, in Mrs. Parish's presence, said to her: "Mrs. Parish, I cannot understand him." He understood nothing from his

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motions: "they were unmeaning." This was in October, 1849. John Ward, long an intimate acquaintance, and with whom Mr. Parish transacted a large amount of business in Mrs. Parish's presence, from the period of his attack until his death, says that he addressed himself generally to Mr. Parish, but he does not remember that Mr. Parish ever made any answer, by sign or motion, until Mrs. Parish had spoken to him; and he emphatically says, that in all his negotiations with Mr. and Mrs. Parish, to the best of his recollection, he "never heard Mr. Parish utter a word after his attack." Mr. Parish's faithful and true friend, Mr. Kernochan, and who was almost his daily visitor during this long period of his affliction, in answer to the question, "Did you ever understand or attach any meaning to the motions of his hands, or the sounds accompanying them?" says: "I certainly never understood them; I attached no definite meaning to them of my own observation. There was never any distinct articulation in any case; not even of a single word."

It is thus seen that great difficulties and uncertainty, to say the least of it, attended any expression of the thoughts or wishes of Mr. Parish, and that a large number of those having business or intercourse with him, utterly failed to attach or obtain any meaning to his signs, sounds, motions, or gestures. The natural and obvious deductions to be made from all these facts and circumstances are, that Mr. Parish had no ideas to communicate, or if he had any, that the means of doing so, with certainty and beyond all cavil or doubt, were denied to him. If some, with the aid of an interpreter, and always the same, indulged the charitable thought that they correctly apprehended his wishes, it is clear that others, equally intelligent, with adequate and equal opportunities of judging, and with the same aids, utterly failed to comprehend him.

The facts testified to are of such a character, giving full and proper weight to all the evidence, regarding it in the most favorable light to the proponents, as to leave great doubt on the mind that Mr. Parish, after his attack, was any thing more than the creature of habit the reflex of the opin-

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ions and wishes of others, the clay in the hands of the potter, to be moulded into any shape or form desired. His hearing was good; the sight of one of his eyes, although impaired, was not seriously affected, and he had the perfect use of his left hand and arm. Nothing was more natural, therefore, than that those who entertained the idea that he possessed intellect, would resort to the obvious facilities and aids to enable him to give it expression. The power of speech, it is manifest, was denied to him; if he possessed any, it was exercised most imperfectly, and with no practical advantage. This, the obvious and usual method of communicating thought, he had not. None could fail to know, that, if Mr. Parish had thoughts, the great and controlling anxiety of his life would be to give them expression, and to manifest them to his friends. Independently of the social gratification attendant upon such successful effort, he had great interests to manage, a large property to look after, and the accumulation and management of which had been the absorbing object of his life. A large estate had accumulated and was accumulating, which, if he knew any thing, he must have known was taking a direction, as the proponents allege, hostile to his wishes, to those from whom he was alienated, and away from the cherished objects of his regard and affections. Every conceivable motive and consideration pressed upon him, therefore, to keep up intercourse with his family and friends, if the thing was possible. No man having the power thus to communicate, and having thoughts and wishes to express, thus circumstanced, would remain in a living grave for seven years, without making superhuman efforts to be understood by those around him. Those friends rightly assumed, therefore, that Mr. Parish would be most solicitous to maintain intercourse with them, if it were possible so to do. The first attempt, and the most obvious one, was to have Mr. Parish write with his left hand. He had the perfect use of it; could write well; had done it all his life. We all know from experience how simple this process is, and how easy of execution. We can see how effectual it would

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have been in enabling Mr. Parish to express his wishes, and keep up his intercourse with his friends, and retain the management and control of his affairs, and make such disposition of his estate as he then desired. This expedient, though effectually tried and persistently urged upon Mr. Parish, utterly failed of accomplishing any satisfactory result. One of the witnesses thinks, that on one occasion he succeeded in writing the word "horse," and the same witness says he wrote several times the word "wills." The latter efforts were preserved, and are produced and made exhibits in the cause. An inspection of them will show that there is no propriety in interpreting them as "wills," or any other word; they are nothing but imperfect, unmeaning scrawls, such as any child might make who had strength to hold a pen. They unmistakably show that there was no mind to guide the hand, or if there was any, not of sufficient force to control the will, and second its determinations. If Mr. Parish had any mind capable of operation, and of forming conclusions, his faculty of hearing remaining unimpaired, it would have been the easiest thing imaginable for him to have written the word "Yes," in response to any question he desired to answer in the affirmative, and the word "No," to any he desired to answer in the negative. This could have been done with much less effort than was required to write the words "horse" and "wills."

This attempt to have Mr. Parish communicate by writing, having proved fruitless, resort was had to block-letters, a very simple and facile mode of communicating thought by those who are deprived of the natural use of doing so by speech. If he had any thoughts to communicate, he had thus at hand an easy, certain, and effective means of doing so with accuracy and beyond the peradventure of mistake. The slightest exertion only was required—no fatigue could ensue. This attempt, also, produced no results. Another effort was also made with the letters of the alphabet in another form, and it also was unsuccessful.

A further and different mode was suggested by some of his

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friends, which, if the theory of some of the witnesses for the proponents is correct, afforded a safe, sure, and easy method of communication. It was the use of a dictionary by Mr. Parish. This process had two advantages: it would have enabled him to suggest topics of inquiry, and insured intelligent and certain answers to the questions put to him. A moment's reflection will satisfy any mind, that no process could have been devised more certain and satisfactory than this, for holding intercourse with an intelligent mind, to which was denied the power of giving expression to its emotions and thoughts in the form of speech. No results were obtained from this source, and the inference from the testimony is, that no efforts were made to afford Mr. Parish the opportunity of trying this method of communicating his thoughts.

And this omission greatly strengthens the impression conveyed by the testimony, that he did not and could not read at all after his attack. It is true that he was seen *to look* at newspapers, accounts, ledgers, check-books, notes, &c., but that *his mind* took in and comprehended what his visual organs discerned, the evidence in this case will not warrant us in assuming. It is natural to suppose, that, if Mr. Parish could read, he would have desired himself to peruse these codicils, and they would have been placed before him for that purpose; and, on the assumption that he could, the inquiry presses upon us, Why were they not given to him for perusal? If it had been established that he could read intelligently, and it had appeared that these codicils had been read over by him, it would have furnished much more satisfactory evidence than any we now have, that they expressed his wishes. If he could read, and had intellect to understand what his eyes beheld, why is it that there is an entire absence of evidence that he was ever seen reading, with apparent understanding, a letter? of his ever having been seen, on any one occasion during his long confinement, with a book in his hand, perusing it? Is it to be believed, that if Mr. Parish could read, and had a mind to comprehend what he read, that he would not, during these whole seven years, when he

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was almost entirely excluded from intercourse with the world, have once resorted to books for amusement and instruction? It is incredible. We all know that no greater solace is available to an invalid, and none more universally sought after. They are companions always at hand, of the most soothing, agreeable, and entertaining character; and it cannot be doubted, that, if Mr. Parish could read, and had intellectual capacity sufficient to understand what he read, that books would have been his daily and constant companions. These views press themselves on us with great force, if we concur in the opinion of Dr. Taylor, that Mr. Parish, after his attack, became a devout and sincere Christian, and was anxiously and inquiringly seeking to make his peace with his Maker, whom he must have expected soon to meet. Where would an intelligent Christian sooner turn for advice, direction, and consolation, than to the Bible? This book, we all know, is printed in type so that all, of any degree of vision, can peruse it. Nay, those totally deprived of sight are not precluded from resorting to it for comfort and direction. We have looked in vain through the testimony in this case to find any evidence that Mr. Parish ever read his Bible, that one was ever procured for him, or that any effort was ever made to induce him to peruse it, or that he ever indicated a wish to do so.

To what result does this review of the facts and circumstances in this case, adverted to and commented on, lead the mind? On a careful consideration of them all, with a most anxious desire to arrive at a just and correct conclusion, *we are clearly of the opinion that the attack of Mr. Parish on the 19th of July, 1849, extinguished his intellectual powers, so obliterated and blotted out his mental faculties, that after that period he was not a man of sound mind and memory within the meaning and language of the statutes, and was therefore incompetent to make a will, and that the codicils of September, 1853, and of June, 1854, were not his will, and formed no part thereof.*

We have endeavored to give just and due weight to the

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arguments and suggestions so eloquently and ably urged upon our consideration by the counsel for the proponents. Neither are we unmindful that, in coming to this conclusion, we differ with many witnesses of intelligence, who have expressed the opinion under oath that Mr. Parish, at the time he executed those codicils, understood their import and effect. With the highest respect for those gentlemen, our duty calls upon us to consider all the facts presented by the testimony, to scan and weigh their testimony as well as that of the other witnesses in the cause, and, after a careful and accurate examination of the testimony on both sides, to say whether the papers propounded should be admitted to probate. We have a clear conviction, and one which we have arrived at without hesitancy or doubt, that they ought not. We think that, in a case presenting so many obstacles on the part of the proponents, and which, we are compelled to say, have not been removed, the surrogate decided correctly in refusing to admit these codicils to probate.

We are impressed with the soundness of the rules of law, before adverted to, that it is much less material that those who seek to impeach a testamentary instrument, should not be able to explain certain things in their case, should be forced to admit that their argument is not in every part consistent with all the facts, than that they who seek to establish the will, should give no rational, consistent, or intelligible solution of those difficulties which incumber their suppositions, and obstruct the path towards the conclusion that they would have us arrive at; that it is not the duty of the court to strain after probate, and especially to seek to establish a posterior will, made in conceded enfeebled health, unsustained by previous declarations of intention, over a prior will made in health, and with care and deliberation, when the provisions of the posterior will are in direct hostility and conflict with those of the prior one; that heirs and distributees may rest securely upon the statutes of descent and distributions, and that their rights are not to be taken from them, unless by an instrument executed in conformity with the formalities

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prescribed by statute, and by a person authorized by it to make and execute such instrument; that it would be in violation of long and well established principles, and an almost uniform and unbroken current of decisions in England and in this country, to admit to probate testamentary papers, prepared and executed under the circumstances which these were, by a man who was in apparent full physical health, and possessing nearly his natural strength, who could not or would not write, who could not or would not speak, who could not or would not use the letters of the alphabet, or even a dictionary, for the purpose of conveying his wishes, upon proof solely that they were supposed to express the testator's wishes, from signs, gestures, and motions made by him, and especially when it appeared that such signs, gestures, and motions were often contradictory, uncertain, frequently misunderstood, and often not comprehended at all. It is not to be forgotten that, during the whole period intervening between the attack of Mr. Parish and his death, there is no evidence that he, by himself, ever performed a single business transaction, ever made a purchase or sale of property, or ever expended a single dollar, or was ever intrusted with one, although the owner of a million. These facts are instructive, as shewing that he was treated and regarded by those around him as *non compos*, and his condition undoubtedly was that of utter, certain, and absolute *dementia*.

If, however, these views are stronger than the facts will warrant, there is another proposition which is undeniable, and that is,—if, on due consideration of all the testimony and the arguments, the mind of the court is *in equilibrio*, then the proposed codicils must be pronounced against. In the present case, as already observed, there is a will free from all question and all controversy. It was made by the testator after peculiar deliberation, and certainly disposes of his property not unnaturally or inequitably. No change in the circumstances of the testator's family having occurred, and a condition of bodily and mental weakness having supervened, certainly well calculated to create grave doubts of the

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testator's soundness of mind, codicils are produced, claimed to be his last will and testament, revoking previous dispositions, and giving an entirely different direction to the great bulk of his estate, without any apparent or assigned cause. The language of Lord BROUGHAM in *Panton v. Williams* (*supra*), is apposite and may well be followed: "That when the question arises between one will and another of a prior date, the proof being upon the party propounding any testamentary writing, the course of administration directed by the law is to prevail against him who cannot satisfy the court of probate that he has established a will; or the prior instrument which is liable to no doubt is to be established in preference to the posterior one which cannot be proved to speak the testator's intentions so as to leave the court in no doubt that it declares those intentions."

The argument has been much pressed upon us, that the concentration of the great mass of the testator's estate in Mrs. Parish, is supported by several collateral circumstances, and that therefore the court should be less exacting in the quantum of proof to sustain such bequests, than it would demand when they were not thus supported. It is said that it might well be supposed that the testator would desire to keep up and have maintained his family establishment the same after his death as before. The answer to that argument is, that he had made most abundant provision for this in his will of 1842, by leaving to Mrs. Parish an income of about \$23,000 annually, while the current expenses of both in his lifetime had never exceeded \$10,000. He had, therefore, provided for her singly more than double the amount required annually for both.

It is also urged that the alienation of his feelings towards his brother Daniel afforded a sufficient reason for revoking his appointment as executor and the legacy to him of \$10,000, and the revocation of the residuary clause in the will of 1842 in favor of his brothers Daniel and James; and that this alienation is confirmed by the efforts made by him on two several and distinct occasions to annul the legacies to his unof-

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fending nieces and nephews, the children of those brothers. It is believed that it has already been conclusively shown that there is no evidence in the case tending to show any such alienation of affection on the part of Mr. Parish towards his brother Daniel; but on the contrary, it distinctly appears that in all the interviews between them after his attack, no evidences of such alienation were exhibited, but every thing was in harmony with their previous relations. But if it were so as to Daniel Parish, the cause assigned is wholly inadequate, for any such unfriendly feelings towards James Parish, as to withdraw from him or his children, or those of Daniel even, what had been secured to them with so much care and deliberation and natural propriety.

It is also claimed that it is manifest, from the framework of the original will, that the testator did not intend that his brothers should have any considerable portion of his estate. This argument has in part already been answered, and, in addition, it may be observed that the peculiar and careful language of the will is such, that it conveyed to the residuary devisees all the property, real and personal, of the testator which he might own or be possessed of at the time of his death, not specifically given or disposed of by the will. He had disposed of \$331,000 to his wife. This was absolutely hers, or subject to her disposal. He had specifically given property amounting to \$60,000 to three young gentleman, kinsmen and friends, and legacies in the aggregate to \$290,000. On his return from Europe in 1844, having ascertained that two of the legatees, whose legacies amounted to \$20,000, children of his brother James, had died, he called on Mr. Havens, the counsel who prepared his will, to ascertain, among other things, what effect their deaths would have upon its provisions. It is not to be forgotten that Mr. Parish always kept a duplicate of his will with him, and it is not to be doubted that it was often referred to, and its contents the subject of his frequent meditations. Mr. Havens correctly informed him that the death of any of the legatees in his lifetime, under age or without issue or an appointment,

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would lapse the legacies, and that they would then fall into the residuum of the estate, and pass to the residuary devisees. With this he was satisfied. Two other children of his brother James died before his attack, whereby the residuary fund was increased \$40,000, and by reason of the reduction in the estimated value of his property made by the testator himself on the first of July, 1849, the apparent increase in his estate since 1842 had only been \$165,857. Its real increase was in fact much more, as the Union Place property had cost him \$112,000, and was actually then worth that, or more, but was estimated by him at only \$60,000. On the first of July, 1849, the testator saw that his brothers would take under the will, the amount, as estimated value of the residue,—in 1842, \$36,879; lapsed legacies, \$40,000; increase of estate, \$165,857; under-estimate of Union Place house, \$52,000; total, \$294,736; which would be nearly \$150,000 to each, and which might be enhanced, and obviously would be, by other legacies falling in, and the natural increase of his estate. With these results clearly before him, he made no change in the framework of his will.

It is also urged that the codicils made by Mr. Parish after his attack were made to evince to Mrs. Parish his increased affection for her, and his grateful appreciation of her kind and assiduous attentions to him during his protracted illness. This argument has, we think, no force whatever, so far as it presents an inducement for the execution of the first codicil. That was prepared and signed within a few days after returning consciousness from the blow of July 19; and in regard to the other two codicils, the testimony does not contain any indications of an increase of affection on the part of Mr. Parish for his wife after his attack. On the contrary, if he was a conscious and responsible man, the inference would be that the affections of the husband had been much weakened, that he evinced no tender or growing regard for her, and had no grateful appreciation of her watchfulness and care of him. On the theory of his intelligence and testamentary capacity, his treatment of her was strange and unaccountable, and

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would lead us to expect that he would have sought to have reduced the provision which he once thought ample and munificent for her, rather than devolve upon her nearly the whole of his estate, to the entire disherison of all those of his own blood, some of whom had the strongest claims upon his bounty and his affections.

Much stress is also laid upon the circumstances testified to by Mr. Ward in reference to the purchase of notes by Mr. and Mrs. Parish, and one inference is drawn, that in purchasing the notes, Mr. Parish relied upon his own knowledge of the mercantile standing of the makers, and that the same was made upon his judgment solely. Mr. Ward's testimony will hardly bear that construction, and a moment's reflection will make it obvious that if Mr. Parish purchased notes upon the information he possessed of the mercantile standing of the makers, he must have done it very blindly. He had been excluded for years from intercourse with the mercantile world, and would necessarily know, if he knew any thing, but little of the changes and losses of business houses. We have too many instances of firms, having wealth and unbounded credit one week, plunged into hopeless insolvency the next, to place much reliance on the judgment formed on knowledge obtained in, and previous to, 1849, as to the responsibility of firms in 1854 and 1855. It was more simple and easy to determine the value of the securities of a corporation whose resources and property were matters of public notoriety, than the means of private individuals. Here, real and apparent are far from being the same. A careful examination of Mr. Ward's testimony will leave the impression that Mr. Parish never, except perhaps on two occasions, and then by nods of assent, made any answer to any suggestions from Mr. Ward until Mrs. Parish had spoken. It has been shown that very little reliance could be placed on Mr. Parish's motions of assent or dissent. There is nothing in the case to show that Mrs. Parish would have permitted important purchases to be made predicated upon them, unless she had been satisfied of their wisdom and propriety. In fact, it is incontrovertible that

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she placed no confidence in the manifestations of his wishes and opinions in trivial matters, and so frequently stated; and it is impossible, with this evidence before us, to believe that she acted upon any indications made by him in matters involving the disposition and safety of thousands of dollars.

We have not thought it necessary to discuss the learned and able medical opinions furnished on both sides to the court for its perusal and consideration. We do not understand that the parties have agreed that they should be regarded as testimony in the case with the same effect as though the writers had been examined as witnesses. They are valuable disquisitions upon the subject treated, and evince the highest grade of professional talent and knowledge. While they have been instructive to the court, they cannot strictly be regarded as evidence in chief in the case. Opinions, however respectable, and coming even from the most intelligent minds, are not the sources from which the judicial mind seeks enlightenment. The law, for wise purposes, has precluded it from relying on facts not communicated under the solemnity of an oath, and it is the duty of every tribunal called upon to pass on a question of fact, to confine its investigations to such facts as are verified in a legal manner. If it then fails in arriving at the truth, it will have done its whole duty, and the result must be attributed to the imperfections of our judicial system, and the inadequate tests which the mind is capable of applying to discover it. We have not, therefore, considered as evidence the mere opinions of these medical gentlemen, and we have accordingly examined their disquisitions in the same manner, and for the same object, that we would examine any medical treatises on the same subject. Their value consists mainly in the arguments and reasons they contain, as applicable to the facts developed in the present case, and we have so regarded them. They have been to us sources of great instruction, and are valuable contributions to the study of medical jurisprudence, and exhaust the *medico-legal* aspects of the intricate diseases of the brain arising from apoplexy, paralysis, and epilepsy.

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In the consideration of cases like the present, in reviewing the findings of the surrogate on questions of fact as well as his conclusions of law, we regard the matter as *res nova* with us. It is true, we have not the living witnesses before us, but we have their testimony, taken with all the safeguards which the law affords, and we have all the facilities of arriving at the truth which the Court of Chancery, or the ecclesiastical courts, ever had. . It certainly affords us gratification, then, on the careful examination of all the testimony in the case, aided by an extended discussion by able and learned counsel, and the mature consideration which has been given to the case, to have arrived at the same conclusion as that of the learned and intelligent surrogate who heard it in the first instance, and whose decision was affirmed by the Supreme Court. In the examination of the peculiar features of the present controversy, we have also been assisted and gratified by the profound and elaborate preparation, as well as by the learned and interesting discussions of the eminent counsel who have addressed the court. It is one of those cases in reference to which Mr. Justice ERSKINE wisely and justly said, "that the protection of the law is in no cases more needed than it is in those where the mind has been too much enfeebled to comprehend more objects than one, and most especially where that one object may be so forced upon the attention of the invalid as to shut out all others that might require consideration." These views lead to the establishment of the will of 1842, unaffected by, and in no wise impaired by the codicils of September, 1853, and June, 1854.

We are of the opinion that the judgments in each of the two above-entitled causes should be affirmed, without costs to either party in the first, but with costs in the second cause.

DENIO, WRIGHT, ALLEN, and SMITH, Justices, concurred.

GOULD, J., concurred in the conclusions, but not in the opinion of the majority of the court. He held that Mr. Parish was competent within the rule laid down in the case of

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Stewart v. Lispenard (26 Wend., 255). That, while an idiot cannot make a valid will, yet one who has any mind at all, however low his grade of intellect, may do so; that the law does not distinguish between different degrees of intelligence, and that to deprive a man of testamentary capacity, he must be totally destitute of reason and understanding. This decision he considered to be binding on this court. He held, however, that the mind of Mr. Parish was very much enfeebled, and that the codicils were void by reason of the fraud and undue influence of Mrs. Parish; that they were her codicils, and not his.

Selden, Ch. J. (dissenting).—This case, with its voluminous proofs, its extended medical arguments, and elaborate briefs, has swollen to such a size, that it is quite impossible for the court, in an opinion of reasonable length, to take a complete and comprehensive view of all the various aspects in which it is presented. I shall attempt no more than barely to group a few of its prominent features, in as brief a space as possible, selecting such points, as, while they may not appear to others the most striking and important, seem, nevertheless, to me, to be not only pertinent, but entirely decisive of the case.

Were we at liberty to entertain, at the outset, a wish as to the conclusion to which we are ultimately to arrive, it would undoubtedly be, that although we might find that the codicils were invalid, we might also find that the will itself was revoked, and that Henry Parish died intestate. This result, while it would give to the widow a very bountiful provision during her life, and a large estate to be transmitted to her relatives upon her death, would, at the same time, place the brothers and sisters of Mr. Parish upon a footing of equality as to the residue. But notwithstanding the very ingenious argument of the counsel for the sisters of Mr. Parish, and a natural inclination to give to that argument its fullest force, I have been unable to see how it can, with propriety, be held that the will was revoked. Admitting the soundness of the argument, that testamentary capacity may be divided into

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the power to conceive ideas, and the power to express them; that the latter is as essential to the competency of the testator as the former, and that a person may well be capable of expressing the simple desire to revoke a will, and yet quite incapable of adequately communicating his wishes in regard to the complex provisions of a new will, still it can hardly help the counsel's case.

The argument applies solely to express, and not at all to implied, revocations. The only express revocations here, are those contained in the second and third codicils, of the legacy to Daniel, and of the residuary clause in favor of Daniel and James Parish. Now, conceding that in a case where a testator, apparently intelligent, but whose powers of communicating his ideas were limited, had, in proper form, revoked a previous will, and then by a subsequent and distinct act had made another will, it would be possible to hold the revocation valid, on the ground that the intention to revoke was clear, and the second will invalid, on the ground that it did not sufficiently appear that its provisions were in accordance with the real wishes of the testator; still, the doctrine cannot, I apprehend, apply to a case where the revocation and the new provisions are contained in the same instrument, and are part and parcel of the same transaction; for the very plain reason, that it would be impossible, in such a case, to say that the testator would have wished to revoke the former will, except in connection with the new disposition made of the estate. The codicils cannot, therefore, be held valid as to the revocations which they contain, and void for want of testamentary capacity as to the residue.

The revocations, whether total or partial, in this case, then, if any, must be *implied*. Without examining the question whether the circumstances relied upon by the counsel would amount to an implied revocation at the common law, it seems to me that our statute (2 *Rev. Stat.*, 64, § 43, *et seq.*), presents an insurmountable obstacle to the establishment of such a revocation here. The notes of the revisers upon those sections, show conclusively that it was their intention to preclude

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all implied revocations, except such as were expressly recognized. They say, in terms, that the provisions contained in the sections referred to, "it is believed dispose of the whole doctrine of implied revocations." The effect of these provisions was considered by this court, in the case of *Langdon v. Astor* (16 N. Y. [2 Smith], 9), where a distinction was taken between the ademption and the revocation of a legacy; and where, although the court held that there might still be an ademption or *ante-mortem* satisfaction of a legacy, it was nevertheless conceded, that, since the statute, there could be no implied revocation except such as the statute contemplated. Judge Denio, by whom the opinion of the court was delivered, after stating the nature of the implied revocations enumerated in the statute, and the distinction between such revocations and ademptions, says: "The courts cannot, consistently with the statute, hold that any other mere change of circumstances will amount to an implied revocation."

The counsel suggests a long list of cases in which he supposes there must, of necessity, be a revocation, notwithstanding the statute. But these are mostly cases where the devise or legacy has become inoperative by reason of the destruction or alienation of the subject-matter of the devise, &c., prior to the testator's death. Circumstances of this sort do not necessarily work a revocation of the will, but merely operate to prevent the beneficiary from enjoying its fruits. The will may, nevertheless, be proved, leaving its effect to be determined when the devisee or legatee prefers his claim. As to the testator's expressed intention, or wish, to revoke or change his will, upon which the counsel seems to rely, nothing can be clearer than that such an intention, to be of any avail, must be carried into effect in the manner prescribed by the statute. As a mere auxiliary to circumstances tending to effectuate an implied revocation, it is useless, as there can be no such revocation except in the cases for which the statute provides. It is impossible, therefore, to sustain the appeal of the two sisters of Mr. Parish.

The remaining questions relate to the validity of the second

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and third codicils to the original will. It is insisted that those two codicils are void, on the grounds: *First*, that the testator was mentally incompetent, at the time they were executed, to make any alteration of his will; and, *Secondly*, that they were obtained by the fraud and improper influence of Mrs. Parish. It did not appear from the oral arguments of the counsel at the hearing, that they differed essentially as to the degree of intelligence required to enable one to make a will. But their printed briefs present very opposite theories on the subject, and I cannot consent to pass the question without remark, as I am unwilling to have it inferred that I assent to the rule, in respect to testamentary capacity, supposed to have been established by several cases in this State, especially the case of *Stewart v. Lispenard* (26 Wend., 255). That rule is said to be, that while an idiot cannot make a valid will, yet one who has any mind at all, however low his grade of intellect, may do so: that the law on this subject does not distinguish between different degrees of intelligence, and that to deprive a man of testamentary capacity, he must be *totally* destitute of reason and understanding. Considered philosophically, it is manifest that this rule cannot be sustained. It assumes that it is possible to draw a definite and precise line of distinction between idiocy and mental power. The fallacy of this assumption it requires no argument to prove. If, as I suppose, every perception is an act, and every idea a state of the mind, then to distinguish a man from a tree, or a house from a horse, is indicative of mind. But I desire to test this rule, not by any mere metaphysical reasoning, but by facts and principles familiar to all. Almost every one of ordinary experience, has known various persons who were classed both in common parlance and in law, as idiots, and must have observed, that while some of these persons have more, and some less, intelligence, few, if any, are entirely destitute: that most of them know their friends from strangers, manifesting affection for the one and aversion for the other, and that many have the power of speech, not imitative merely, like that of the parrot,

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but expressive, to some extent, of thought, of feeling, and of will. All this requires intelligence, and intelligence proves mind. Idiots, therefore, have mind, and the difference between them and a Bacon or a Newton, is a difference in degree alone.

It is said, that this rule having been established in this State by repeated decisions, it is too late now to call it in question. But no amount of authority can establish a rule which is selfcontradictory. If it be, as I deem it to be, undeniable, that idiots, or if not all, at least some persons belonging properly to that class, have more or less understanding, then the rule in question both affirms and denies, that such persons have capacity to make wills. There is, and can be, no doubt that courts, in passing upon questions of testamentary capacity, will and must distinguish between different grades of intelligence, and that, in cases like the present, the inquiry is, not whether the testator possessed *some* intelligence, and *some* mind, but whether he possessed that *degree* of intelligence which would qualify him to dispose of his estate by will. It by no means follows, however, that when the inquiry relates to idiocy or mental imbecility, and there is no allegation of insanity, that it is necessary to bring the capacity of the testator up to the standard of what may be called, in any just or even technical sense, "a sound mind." This phrase has two significations. In common parlance, it means a mind of more than ordinary strength, discreet and well balanced. In law, it means a mind not affected with *insanity* in any form. In neither of these senses can it by possibility be made a test of mere mental imbecility. It is said to have a third signification, and to be used as synonymous with *compos mentis*, and to express the idea of legal competency. It has no doubt been sometimes vaguely used in this sense; but such use is obviously inaccurate, and tends strongly to mislead. Take the case of one but just elevated above the grade of idiocy, who has barely *sense* enough to escape a commission, and is it not absurd to speak of him as a person of sound mind?

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It is held in the case of *Stewart v. Lispenard*,—and to that, under the authorities in this State, I feel bound to assent,—that a man may be capable of making a valid will, and yet incapable of executing a deed, or making a contract for the purchase or sale of property. Our statute, which allows wills to be executed at the age of sixteen by females, and eighteen by males, tends to support the idea. A court of equity, therefore, may commit the estate of such person to the charge of a committee, and yet, after his death, give effect to his will. We may properly say of such a person that he is *compos mentis* in one respect, and *non compos mentis* in another; that is, that he has a mind competent to make a will, but incompetent to make a contract; but we cannot say that he has a mind *sound* for one purpose and *unsound* for another, without doing gross violence to language. It is obvious that "*non compos mentis*" and "of unsound mind" are not, as the counsel seem to suppose, convertible terms; and that the words "sound" and "unsound" have no appropriate relation to questions of idiocy or mental imbecility.

If we would have clear and definite ideas on this subject, we must not abandon all precision in the use of phraseology. *Non compos mentis* is a general term, embracing all who are deemed legally incompetent to transact business. It includes three separate classes, viz.: idiots, persons of unsound mind, and persons of unsound memory. Each of these classes is entirely distinct from both the others. The first embraces not only congenital idiots, or idiots from birth, but also such as have subsequently become mentally imbecile from sickness or other causes. The second class comprises all who suffer from aberration of mind, whether they are lunatics, monomaniacs, or generally deranged. The third is confined to a peculiar class, composed mostly of persons whose memories are impaired by age. To mingle these separate classes, each of which has its distinct features, as is frequently done, tends inevitably to confusion. We have already seen that idiots cannot be classed with persons of unsound mind, in the

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technical sense of the latter phrase. It is equally clear that persons of unsound memory belong to a different class from either of the others. Although an unsound memory is proof of an unsound mind, yet the converse is not true. The mind may be unsound in other respects, while the memory remains perfect. Every one of experience in life knows that in advanced age the memory sometimes becomes impaired to such a degree that the individual forgets his friends and kindred, and is unable ordinarily to tell the names or number of his children, or whether they are alive or dead, and yet this same individual may, under some sudden stimulus or strong excitement, exhibit for a time his mental powers, memory included, in all, or nearly all, their former vigor. I have had occasion, in one instance, to pass judicially upon a will where the testator appeared to be substantially in this condition. It was sought in that case, which is not reported, to apply the rule laid down in *Stewart v. Lisperard*; but nothing can be plainer than that this rule could have no application to such a case.

It may be objected to the classification here given, that it does not comport with the language of our statutes on the subject. It is true that the statute concerning wills of real estate, in its enumeration of persons incapable of making a valid devise, specifies only idiots and persons of unsound mind, and omits to name, specifically, persons of unsound memory; and that the statute concerning wills of personal property provides that every person of "sound mind and memory, and no other," may make a valid bequest. These statutes do, no doubt, imply that, in some enlarged and comprehensive sense, the term "unsound mind" may be held to embrace both idiots and persons of impaired memory; but when taken together they also recognize the very distinctions for which I contend. The first distinguishes between idiots and persons of unsound mind; and the second treats an unsound memory as something distinct from general mental unsoundness. That these distinctions are real, is too plain to be denied; and it proves nothing against their existence, that

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legislators and judges have not always observed them. Baron COMYN has used the terms "idiots" and "of *non sane* memory" as embracing every class of persons who are to be regarded as *non compos mentis*. (See *Com. Digest*, tit. *Idiot*.) The Statute of Wills (34 and 35 Henry VIII.) does the same, by providing that no will of lands shall be valid if made by any "idiot, or by any person of *non sane* memory;" but this only shows a want of just discrimination in the use of terms. It is nevertheless clear, that a mere monomaniac, whose mind is perfectly sound aside from a single hallucinated idea, cannot *properly* be said to be of unsound *memory*.

It is plain, from what has been said, that persons deemed in law *non compos mentis* are properly divisible into classes, and that such a division is indispensable to a clear understanding of the subject. It is equally plain that the competency of persons belonging to one of these classes cannot be determined by rules specially applicable to another class. The question in this case relates to the idiocy or mental imbecility of the testator; and in determining this question, it is unnecessary to inquire whether he was possessed of a *sound* mind, or a *sound* memory, but only whether he retained that moderate degree of reason and understanding which is required to enable one to dispose of his property by will. It is not enough that he should be found to have possessed *some* degree of intelligence and mind. He must have had sufficient mind to comprehend the nature and effect of the act he was performing, the relation he held to the various individuals who might naturally be expected to become the objects of his bounty, and to be capable of making a rational selection among them. If he had this amount of intelligence, then the codicils which were rejected by the surrogate are valid, and should have been admitted to probate, unless it appears that they were obtained by the fraud or undue influence of Mrs. Parish.

The positions taken by the counsel for James and Daniel Parish, are: 1. That the testator, Henry Parish, at the time of the execution of the codicils in question, and for the last

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six years of his life, was a perfect imbecile, without reason or understanding, and absolutely incapable of any rational act; and 2. That if he can be supposed to have had any capacity, he was, in making the codicils, completely under the control of his wife, by whose fraudulent practices they were obtained.

I have no intention of entering into any analysis of the mass of evidence which has been adduced, bearing upon these questions, but will barely advert to a few items which appear to me of a striking character. There is no doubt that the opinions of intelligent witnesses, although not experts, are to be received upon such an issue. It would be utterly impossible to describe in words the air and manner, the tones of voice, and expression of face, from which, to a great degree, the conclusion must be drawn. Personal observation is almost indispensable to accuracy of judgment in such a case, and hence the reception of opinion in evidence becomes a necessity. Among the witnesses called by Mrs. Parish to support the codicils, are her brothers, Edward, Henry, and Richard Delafield; Mr. Lord, who drew the codicils; Mr. Taylor, a minister, and rector of Grace Church; Mr. Tileston, president of the Phoenix Bank; and Gov. Bradish, president of the Bible Society. All these are conceded, by the counsel, to be men of the highest character and intelligence. Of the three brothers of Mrs. Parish, Edward was the physician of Mr. Parish, and in constant attendance upon him during the whole six years of his illness. Henry, a merchant, lived in the house with him during this time, and was with him a great part of nearly every day. Richard, a major in the United States army, and superintendent of the Military Academy at West Point, had frequent opportunities of intercourse with him during the same period. Mr. Taylor was also a frequent visitor of Mr. Parish, administering the sacrament to him upon many occasions, and had other religious intercourse, and various financial transactions with him. Mr. Lord drew the codicils, was many times in consultation with the testator in regard to them, and witnessed their exe-

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cation. Mr. Tileston was president of the bank in which Mr. Parish was a large stockholder, saw the latter frequently, and negotiated with him upon some matters of business of great importance. Gov. Bradish was a friend of Mr. Parish, visited him several times during his sickness, and received from him personally a large subscription to the funds of the Bible Society. All these witnesses, without exception, express the most decided conviction that the testator had intelligence, and that he perfectly understood the various matters to which their intercourse with him related. Mr. Lord, in answer to a question as to the state of the testator's mind upon the execution of the second codicil, said, "I had no doubt, I have not any, of his entire capacity to understand what he was doing, and the effect of it." In reply to a similar inquiry as to the mental capacity of the testator upon executing the third codicil, he said, "In my judgment it was perfect for the purpose of making a codicil of this kind; he fully understood it, and fully agreed to it." Mr. Taylor, whose interviews with Mr. Parish were very frequent during the time of his sickness, said, in reply to a similar question, relating to that whole period, "I had not, myself, the least doubt of the soundness of his mind, nor could I have supposed that any intelligent person could doubt its soundness." Mr. Tileston had various interviews, and some very important negotiations with Mr. Parish, and to an inquiry as to the condition of his mind and understanding, after his attack in July, 1849, he answered: "In all transactions between us, I thought he appeared to understand himself perfectly." Gov. Bradish, who saw Mr. Parish upon several occasions, and obtained from him a large subscription to the funds of the Bible Society, upon being inquired of as to the condition of Mr. Parish's mind, replied, that in his opinion the latter "was capable of understanding, and did understand, what the witness said to him, and that his, Mr. Parish's, expressions of affirmation and of negation were very strong, very marked, very decided generally, indicating intelligence, judgment, and decision." It is certainly very difficult to suppose

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that the four highly-cultivated and intelligent gentlemen last named could have had the interviews and intercourse they describe with a man who was substantially an idiot, and not be aware of the fact. I can myself frame no hypothesis upon which such a thing would seem to be at all probable. But if we assume that these gentlemen might have all been deceived, it is quite impossible to believe that the three brothers of Mrs. Parish could have been mistaken. That they should have had daily, and almost hourly, communication with Mr. Parish for six years, and not know whether he could understand the remarks addressed to him by themselves, is inconceivable. Intelligence, or the want of it, is manifested, not by speech alone, but by gestures, air, manner, and countenance. An accidental occurrence of these might deceive for a time, but not for a series of years, or even days. That the Messrs. Delafield supposed that Mr. Parish had intelligence is proven, if they are considered in the slightest degree honest, not merely by their own testimony in this case, but by their whole treatment of him as disclosed by the other evidence. They addressed him as they would have done before his attack, conversed with him, consulted him, read to him from the daily papers, told him the news of the day, &c., &c., and never discontinued this practice until the close of his life. That they could have pursued this course for six years, towards a man without understanding, and still suppose him to be intelligent, can never be believed.

The counsel for the respondents, James and Daniel Parish, evidently felt the force of this aspect of the case, and we will see how he meets it. In speaking of Mrs. Parish, and the frauds and contrivances by which, as he insists, she obtained the execution of the codicils, he says: "We shall find her watching her husband's person day and night, never permitting any intercourse between him and others, which might reveal the true condition of his mind. We shall find her interpreting, according to her own purposes, his signs and gestures to selected persons, chosen to have this nominal intercourse with him. We shall find her preparing such per-

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sons to play the humble part of dupes, by appeals to their self-interest or their vanity, or by palpably untrue representations and impostures practised upon them. We shall find her desecrating to the purposes of fraud and deception, the sacred name and the sacred observances of religion, the holy cause of charity. We shall find her ensnaring her own highly respectable kinsmen in such a net-work, that they are at length constrained in desperation to become the instruments of her will, to forget, to prevaricate, to misrepresent. The learned and eminent counsel is drawn in by one artifice; the pious minister by another; the sexton falls by one piece of practice, the bank president and the president of the Bible Society by another; and finally, to fill up, by direct and unmistakable untruth, every remaining chink in the barricade behind which her plunder was to be intrenched, a desperate wanderer from truth and rectitude is obtained as a witness, and induced to out-Herod Herod."

This is a most forcible and eloquent summary of the positions which it is incumbent upon the respondent to maintain, in order to invalidate these codicils for the want of testamentary capacity. The counsel is clearly right in his conception of the burdens which the case imposes upon him. He sees that it is quite impossible that all these intelligent witnesses should have failed to detect idiocy if it existed, and has taken his position accordingly. These positions are maintained by a vigor of logic, a force of rhetoric, and a perfection of art, which I cannot refrain from saying, has, in my judgment, rarely been surpassed. But is it possible to assent to them? They attribute to Mrs. Parish not merely the wickedness, but the power, of a demon. Women have no doubt existed who were sufficiently vile; but I certainly have never known, and think I have never heard of one who could have accomplished what is here supposed; who could have carried on a game of fraud and deception for six years without a misstep; who could have practised her wiles with such success as utterly to subvert the moral sense of a whole family, consisting of such men as her brothers are admitted

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to be; and, not only so, but to "draw in," as the counsel expresses it, and make "dupes" of lawyers, ministers, and financiers, among the most eminent which the country affords. Is all this credible? One man may be deceived and another suborned; but that a dozen of the shrewdest and most high-minded men in the city of New York, should be thus cheated, cajoled, and corrupted, surpasses belief.

The witnesses I have named are by no means all who had intercourse with Mr. Parish and believed in his intelligence. Those named were selected, because they were specially referred to in the paragraph quoted from the counsel's argument. There were many others, belonging to the same intelligent class: among them I may mention Charles A. Davis and Moses H. Grinnell, both eminent merchants; Leroy M. Wiley, a Southern planter, and former partner of Mr. Parish, and James Watson Webb, editor of the *New York Courier and Enquirer*; all of whom testified to their entire confidence in the intelligence of Mr. Parish. Mr. Wiley, who had a great deal of intercourse with him during his illness, upon matters of business, when asked as to the condition of his mind, said: "As far as I could judge, his mind appeared to be well regulated as to business he was familiar with, or had been familiar with, when in good health." Mr. Grinnell, upon being inquired of whether, in his intercourse with Mr. Parish, after his attack, he supposed the latter understood what was said to him, replied, "I never had any doubt but what he understood distinctly."

The witnesses called on the part of the respondents are far from expressing the same confident opinion. Mr. Kernochan, the leading witness and the former partner and intimate friend of the testator, did not think the latter "had much mind." In his efforts to communicate with Mr. Parish he was never "perfectly satisfied" that the latter understood him. Mr. Folsom, the clerk of Mr. Parish, before and after his sickness, and one of the principal witnesses for the respondents, in answer to an inquiry as to the mental condition of Mr. Parish during his sickness, said: "I think, through

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that whole period, he was not *far removed* from an imbecile, still retaining some memory, some lingering ideas of former business habits, constant efforts to express himself, without the ability so to do, without the mind to enable him so to do." Mr. Ogden, cashier of the Phoenix Bank, had an interview with Mr. Parish upon matters of business, and "could not understand him." These are fair specimens of the testimony upon that side of the case. So far, therefore, as the opinions of witnesses are entitled to weight, the evidence, no doubt, greatly preponderates in favor of the testator's competency.

But opinions are of no importance, if they are contradicted by facts. It is necessary, therefore, in attempting to dispose of this case, to look into the history of the appearance and conduct of the testator during his illness, which is given by the testimony with the greatest minuteness of detail. This I have done, but shall not attempt to reproduce it here. Some of the circumstances which are clearly established, and about which there is no dispute, must, no doubt, be regarded as somewhat extraordinary, upon the supposition that the testator possessed any considerable mental capacity. Those which it appears to me most difficult to reconcile with this hypothesis are: 1. That, although his embarrassment in endeavoring to make his thoughts and wishes known, his power of speech being limited to uttering the words, "yes" and "no," must have been a constant source of irritation and annoyance, he either could not, or would not, learn to write with his left hand, of which, for other purposes, he still had the use; and 2. That he would not, or did not, communicate his ideas by the use of block letters. Various hypotheses might be suggested for the purpose of explaining those circumstances, some of which it would seem to me quite possible to adopt.

But whatever may be the difficulty of accounting for these facts, it can hardly be sufficient to counterbalance the great weight of the evidence which goes to show intelligence. In addition to the force of the opinions referred to, and of the suggestions already made as to the absolute impossibility of

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believing that educated and intelligent men could have daily intercourse, for six years, with an idiot, talking to him, interrogating him, watching his countenance, observing and scrutinizing his actions, and still believe him to be a man of intellect, there is much direct evidence of the testator's intelligence. I shall not attempt to give a summary of this evidence, but shall simply refer to one or two items which appear to me worthy of special notice. Mr. Charles A. Davis was in the habit of visiting Mr. and Mrs. Parish; upon one of these occasions, as he testifies, in the course of a general conversation, Mr. Parish suddenly interposed an inquiry in his usual mode, directing it apparently to him, the witness. He, supposing the inquiry to relate to the subject then under discussion, made various suggestions, which were all met with a "no," and a shake of the head. After similar efforts on the part of Mrs. Parish, but equally without success, Mr. Parish gave the usual indication of his unwillingness to continue the trial longer. It then occurred to Mr. Davis, that he had a few weeks before spoken to Mr. Parish about a valuable piece of property which he was about to sell, and had afterwards sold, and thinking that the inquiry might relate to the price obtained for that property, he said to Mr. Parish, "I know now what you are after, you want to know what that property brought at the corner of Broadway and Franklin streets." Mr. Parish, as the witness says, instantly exclaimed, "'Yes, yes,' repeating it several times, patting me upon the arm, and expressing great gratification at being at last understood." Mr. Davis had previously testified, that the subjects which seemed most to interest Mr. Parish "had relation to property—sales and values."

I will mention here one other item of evidence, which appears to me still more significant. From the constantly accruing income of Mr. Parish's estate during his illness, there were large sums to be invested; many of these investments were made through the agency of Mr. John Ward, a prominent broker of Wall-street, who testifies that his business interviews with Mr. and Mrs. Parish were had in Wall-

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street, to which they came together in a carriage, stopping in front of his office. He would go to the carriage and speak to them, and, when informed that they wished to invest, would propose to them, while sitting in their carriage, various securities for purchase, such as stocks, railroad bonds, and notes of mercantile firms in the city. When stock or bonds were offered, time was usually taken to make inquiries. They would ascertain one day what securities could be had, and return in a day or two and decide whether to take them. But Mr. Ward expressly says, that this was not usually the case in respect to notes. He says that when notes were offered, they were generally accepted or rejected at once. Upon cross-examination, Mr. Ward was unable to specify, from recollection, more than one note which he could be certain Mr. Parish accepted when offered; and also one which had been in like manner rejected; but stated his impression to be that there were others. To the question, "Was it not the usual practice, in these transactions with your house, for Mrs. Parish to ascertain at one call, what notes or securities you had, or proposed to sell, and return the next day, or at some subsequent period, and take or not as was determined upon?" the witness answered, "I think that was often the case; *it was not usually the case in respect to notes*, as I believe." According to the testimony of Mr. Ward, the offer on these occasions was made directly to Mr. Parish, and when the latter accepted, he did so by a nod directly to the witness. Mr. Ward expressly says, that the choice or selection in these cases appeared to be that of Mr. Parish himself.

Now the great, and,—if Mr. Ward is not mistaken in his recollection,—controlling importance of this testimony will be readily seen. The stocks and bonds offered, were mostly those of companies recently organized, the credit and responsibility of which Mr. Parish, from his having been somewhat secluded from the business arena, for a considerable time, could not be expected to have much knowledge; concerning these it was necessary to make inquiries. But when the note of a mercantile firm in the city, with the character

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and standing of which he was familiar, was offered, he was prepared to accept or reject it at once. It is difficult to suppose that Mrs. Parish had that intimate knowledge of the business firms of the city, which would enable her to decide thus promptly. The decision must, as it would seem, have been made, as Mr. Ward supposes it to have been made, by Mr. Parish himself. This testimony proves, not only that Mr. Parish had sufficient intelligence to comprehend a matter of business, but that he had self-reliance, decision, and will. It also, if reliable, affords unmistakable evidence that Mrs. Parish had confidence in her husband's intelligence, and was willing to rely, in matters involving many thousands of dollars, upon his judgment. These facts, if they occurred, cannot by possibility be reconciled with the supposition, that the testator was an imbecile. Their effect can only be obviated by assuming, that Mr. Ward is mistaken in his recollections, or that he misunderstood what transpired. The fact, however, that any distinction at all was made between notes, and bonds or stocks, about which he seems to be confident, and in regard to which we can hardly suppose him to be mistaken, tends to corroborate his recollections in other respects.

I have referred to these items in the testimony of Mr. Davis and Mr. Ward as specimens, merely, of the evidence in the case. Numerous other circumstances are detailed by the witnesses, having the same tendency to support the opinions of those who have expressed their belief in the intelligence and capacity of Mr. Parish. The facts of this character having an opposite tendency, are few and comparatively insignificant. The evidence of incapacity rests mainly upon his failure to learn to write or to communicate by the use of block letters, upon his great physical weakness in some respects, and upon the somewhat qualified opinions of the witnesses introduced by the contestants. The counsel, for the purpose of adding to the force of the evidence, have introduced, by way of *addenda* to their briefs, the written opinions of several medical gentlemen of great eminence. Although these opinions are not under oath, yet, considering

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the character of the authors, the nature of the subject, and the fact, that the reasons for the opinions are in each case so fully given, they are entitled, perhaps, to about the same weight as if sworn to. I shall treat them, therefore, as a part of the evidence in the case.

To estimate rightly the force of these opinions, it is necessary to divide them into two parts; that is, to separate the part which is purely scientific from the residue. To ascertain the physical condition of a person in any respect, from all the visible indications of that condition, is the appropriate duty of the physician: to gather together and combine all the external symptoms bearing upon the state of the brain, or any other organ, and to infer from those symptoms its actual condition, is of course within their province. So, also, from the ascertained physical condition of an organ, to infer its functional powers, is obviously within the range of medical science. When a physician, therefore, from personal observation, or an authentic description of the symptoms of a case, has arrived at the same conclusion, that there is a lesion or deterioration of the substance of the brain, his opinion as to the necessary effect of this injury upon the intellectual powers, is received as evidence. But it is obvious, that, to make this opinion of any special value as a scientific opinion, upon a question of mental capacity, the conclusion as to the injury to the brain, must be drawn from indications other than such as are purely intellectual.

If a medical witness comes to the conclusion from the mental manifestations of an individual that his mind is disordered, that he is insane or imbecile, and from that infers that his brain is diseased, and then tells us that this disease of the brain must necessarily destroy the intellectual powers, we have gained nothing whatever from medical science. We have simply reasoned in a circle; we had arrived at the end of the inquiry as to the mental capacity before touching upon the connection between the mind and the brain, which connection alone brings the question within the scope of that science. Physicians are not necessarily metaphysicians; their

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science relates to the physical man, and to his moral and mental condition only as connected with his physical. Their opinions, therefore, can be considered as properly scientific, only to the extent in which this connection is involved. So far, then, as the individual opinions in this case bear upon the degree of cerebral disease indicated by the apoplexy, the paralysis, the loss of speech, the convulsions, and other physical symptoms, they are to be regarded as the opinions of experts. But in so far as they rest upon the evidence going to show a want of intellect *directly*, and not merely as the result of disease of the brain, they derive very little, if any force, from the professional education of the witnesses. A very large portion of these medical opinions is of the latter description: it is impossible frequently to appreciate their force without observing the distinction here made. It is unnecessary to review these opinions at large. I will advert only to that of Dr. Watson, which is the most elaborate of them all. A considerable portion of this opinion is devoted to showing what must have been the physical condition of Mr. Parish's brain, as deduced from his complaints prior to July, 1849, from the attack at that time, and its immediate effects of paralysis, loss of speech, &c., &c., from his subsequent ailments, such as periodical convulsions, &c., &c. All this falls legitimately within the province of the physician, and from my examination of this portion of the opinion, I must say, that it seems to me, in general, so far as I am qualified to judge of its merits, able and well-reasoned, although open, no doubt, to some criticism, as Dr. Clark has very clearly shown. All the medical witnesses concur in stating, that when the disease is simply what is called *hemiplegia*—that is, when the lesion of the brain is confined to one of its hemispheres, as is usually the case where one side only is paralyzed—the mind is generally but slightly affected. Those called on the part of Mrs. Parish, think that the disease of Mr. Parish was of this nature, and that only one-half of the brain was involved. Dr. Watson, on the other hand, and those who concur with him, contend that the symptoms

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prove a serious disease of both hemispheres. I should find it somewhat difficult to decide between these opposing opinions. Both are maintained with ability, and with some show of authority. If, therefore, the case were found to turn upon this question, its determination might depend entirely upon the *onus probandi*. But I deem it unnecessary to decide which of these two opposing opinions is correct. It is true, if we adopt the conclusion of Dr. Watson, that the whole brain was affected, it would follow that the powers of the mind were more or less impaired. But this would not prove that sufficient intelligence might not still remain to enable Mr. Parish to make a valid will, or even to transact any ordinary business. What Dr. Watson says, is this: "No brain can be *extensively* diseased on both sides of the medium plane, without impairment of mind sufficient to be at once *recognizable* by the medical observer."

Now, although it may be regarded as clear, in this case, that the left hemisphere of the brain was seriously diseased, yet how far the right hemisphere was implicated, is, under the evidence, to say the least, doubtful. It certainly cannot be considered as incontrovertibly established, that the brain, to use the language of Dr. Watson, was "*extensively* diseased on both sides." But even if it was, the only conclusion drawn from it by Dr. Watson himself, is, that the impairment of mind would be such as to be recognizable by a medical observer. This clearly is not enough to render a man incapable of making a will. A man's mind may be perceptibly weakened, and he still possess that degree of intelligence which the law requires in a testator. In any view, therefore, which can be taken of that portion of the medical opinions which assumes to deduce the state of the mind from the condition of the brain, it cannot be considered as in any manner decisive of the question at issue.

There is another portion of the opinion of Dr. Watson, which is of an entirely different character. He recites the testimony of the various witnesses, and comments at length upon it, with a view to its bearing, not upon the physical

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condition of the brain, but directly upon the question of intelligence. I will refer to his mode of dealing with one portion of the evidence, which seems to me of the greatest importance. Many of the witnesses speak of the countenance of Mr. Parish; of its changes of expression; of the play of his features, and expressions of pleasure, or the reverse. Mr. Taylor says: "His face was as expressive as usual—as it ever had been;" and in answer to the question, "How did he manifest the pleasure you have spoken of?" he replied: "There was an expression of pleasure beaming from his countenance, and he continued to nod his head approvingly." Mr. Tileston says: "His countenance changed from time to time, as he was pleased or displeased, on this and all other interviews I had with him." Mr. Bradish, upon being asked whether the expression of Mr. Parish's face was of a uniform character, replied: "I should think not, from my present recollection; it would vary, according to the various occasions of the excitement or interest." Mr. Webb says, on this subject: "His expression was as intelligent as I ever knew it to be, and as responsive to any remark I made." These are merely examples of the manner in which the witnesses generally speak of the expression of face.

Dr. Watson, in reference to this portion of the testimony, uses this language: "I do not know that I ever witnessed an instance, where the *dementia* supervened late in life, in which the patient's faculties were so completely overwhelmed by the disease of the brain, that he could not, while yet conscious, and enjoying his sense of sight and hearing, respond by look, or by the play of features, to the countenance, if not to the words, of those who were addressing. Now, it is this reflection of ourselves in the faces of others, with whom we come in contact, that is so apt to mislead us in our intercourse with the lunatic, the idiot, and the imbecile." This can hardly be considered a satisfactory explanation of this vital point in the evidence. It supposes that the intelligent witness here named, and many others of the same class, with every opportunity for observing, were unable to discriminate

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between the instinctive conformity to their own expression of face; the reflex images of their own countenances, and an intelligent play of features, obviously responsive to the thoughts suggested. This supposition is inadmissible. It cannot be true. They might be misled in a single interview; but that, after a business and social intercourse of years, they should still be deceived, is utterly incredible.

I deem it unnecessary to determine the question of the burden of proof; that is, whether a testator of the requisite age is to be presumed to be *compos mentis* until the contrary appears, or whether it is incumbent upon the proponent of the will, to give evidence in the first instance on this subject, whenever the fact is contested, because, in my view of the case, the evidence greatly preponderates in favor of the position that Mr. Parish at the time of the execution of the codicils, instead of being an utter imbecile, was possessed of considerable capacity and judgment; and more than the law requires to enable a testator to make a valid will. I do not suppose, however, that he retained all his original vigor of intellect; and the question remains, whether advantage was taken of his mental and physical weakness to obtain by fraud, coercion, or the exercise of an improper influence, a will which he would not have made, if left to the spontaneous suggestions of his own mind.

This question, although not as clear in point of fact, as that already considered, for the reason that the capacity of the testator is proved by affirmative evidence, while a conclusion that there was no fraud, would depend, mostly, upon the absence of evidence, is nevertheless, equally clear in law. Fraud and undue influence must be proved. They may no doubt be inferred from circumstances, and the nature of the will may be taken into consideration in determining the point. But I see nothing in the fact that the testator, by the codicils in question, gave the accumulations of his estate to his wife, rather than to his brothers, from which it would be safe to infer fraud. Neither she nor they stood in need of it. She was very munificently provided for by the original will

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and the first codicil, and certainly could have had no apology for making any undue efforts to increase the provision. There may be reason to suspect that she desired to obtain the whole estate, and that she entertained some jealousy of Daniel Parish, and of his influence with his brother, and some dislike towards him and his family. But this, although proof of some human weakness, would not be enough to invalidate the codicils; and this, as it seems to me, is the utmost that can be claimed upon this point. There is no proof that she misrepresented Daniel Parish to his brother, or that she practised any fraud or artifice to create prejudice in the mind of the latter against him, and without this her jealousy and dislike of Daniel Parish, although it may seem to raise a suspicion, amounts to nothing more.

Mrs. Parish's assiduous and constant attendance upon her husband, cannot be permitted to weigh against her. If it could, it would never, in such cases, be safe to act in accordance with the promptings of affection, and a high sense of duty.

There is considerable direct evidence in the case to show that Mr. Parish was not under his wife's control. I will mention only what occurred upon the execution of the second codicil, in relation to the charitable gifts. It having been ascertained, or at least assumed, that Mr. Parish was anxious to give about the sum of fifty thousand dollars to charitable objects, the question arose as to what particular charities should be made the recipients of his bounty. Mrs. Parish's brother Edward was at the head of, and deeply interested in the prosperity of, the N. Y. Eye and Ear Infirmary, and she proposed that the whole sum should be given to that institution; but Mr. Parish at once refused, and persisted in this refusal to the last; finally consenting, after selecting several other objects, to give the sum of twenty thousand dollars, instead of fifty, to the Eye and Ear Infirmary. This, unless Mr. Lord was practised upon to a degree that, in respect to a man of his intelligence, is almost inconceivable, affords very strong proof that Mr. Parish, in making those codicils, ex-

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exercised an independent will. Upon the whole case, I think it quite impossible to hold, that fraud or undue influence, operating upon the mind of Mr. Parish, is established by the proof. The counsel for the respondents, James and Daniel Parish, himself rejects the idea. He argues with great earnestness, that the affection of Mr. Parish for his wife was not increased after his attack in 1849, and to prove this refers to his irritation in consequence of the dietetic restraints which she imposed or urged upon him, and to the testimony of Dr. Delafield on that subject, and then adds, "This same witness, Dr. Delafield, makes a remark quite in harmony with the facts just stated, and our views of the whole evidence. He says, that she had very little influence over him before the attack, and less afterwards." After this explicit concession by the counsel, the question of undue influence may be considered as virtually out of the case. The position upon which the able and eminent counsel relies is, that the testator was idiotic, substantially without mind or intelligence, and that his acts were dictated, and all his movements prompted, by his wife; and the fraud and deception imputed to her, is charged as operating, not upon him, but upon the numerous intelligent witnesses who have testified to their belief in her husband's capacity. I have already stated my reasons for thinking this position untenable. It follows that, upon the evidence before the surrogate, the codicils should have been held valid, and admitted to probate.

SUTHERLAND, J., concurred with SELDEN, Ch. J.

For affirmance of the judgment of the surrogate and Supreme Court, holding the codicils to be void, DENIO, DAVIES, WRIGHT, ALLEN, SMITH, and GOULD, Justices—6.

For reversal, SELDEN and SUTHERLAND, Justices—2.

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NOTE.—In the report of this case in 25 *N. Y.* [11 *Smith*], 9, which has appeared while this volume is going through the press, the reporter states in a foot-note on page 29, that certain cases (*Buel v. McGregor*, and *Matter of the will of Ustick*) cited in the opinion of the court, do not professedly impeach the law of *Stewart v. Lispenard*. On page 66, at the end of the opinion of the court as delivered by DAVIES, J., the reporter also notes the concurrence of four other judges, with certain qualifications; and he adds that DENIO, J. (who was one of the four judges referred to), "did not concur in the disapproval of the decision of *Stewart v. Lispenard*, so far as relates to the law as enunciated in that case." The head-note also questions whether that case was really overruled.

From these statements, it might possibly be inferred that but four judges, in all, concurred in disapproving that case. The fact is otherwise, as may be seen by a careful perusal of the opinions.

The opinion of Mr. Justice DAVIES unqualifiedly condemns *Stewart v. Lispenard*. It is expressly stated by the reporter, at page 66, that Judges WRIGHT, ALLEN, and SMITH, concurred in the opinion rendered by Judge DAVIES. Next, the opinion of SELDEN, Ch. J., at pages 100 to 102, declares his disapproval of *Stewart v. Lispenard*, in the most emphatic terms. He pronounces it legally impossible to sustain the point in that case. "No amount of authority," he says, at page 101, "can establish a rule which is self-contradictory." In this opinion, Judge SUTHERLAND concurred; page 121. It is true that Judge GOULD did not agree to overrule *Stewart v. Lispenard*; and the reporter also states that Judge DENIO did not. But it distinctly appears that six of the eight judges did unite in overruling it.

Again. Mr. Justice GOULD is stated to have read a "dissenting" opinion. It is obvious, however, that the result he attained was a concurrence in affirming the judgment. The opinion of Mr. Justice DAVIES was against the codicils, on the ground of total incapacity. In this, four other judges concurred, making it the judgment of the court. Mr. Justice GOULD considered that, according to the rule laid down in *Stewart v. Lispenard*, the decedent had testamentary capacity; but he condemned both codicils, on the ground that they had been obtained by undue influence. He concurred in the judgment, and did *not* dissent from it.

The reporter's foot-note, on page 121, at the end of the case, gives a history of resignation, illness, and temporary absences of various judges during the year in which this case was decided (1863). These are characterized as an "unfortunate concurrence of circumstances." Every one of these circumstances occurred, however, *subsequently* to the final decision of the Parish Will Case. It may reasonably be conjectured, therefore, that none of them had any influence upon that decision. All the judges were present on each argument of this cause, except Judge SELDEN, who was absent during the first argument, and who gave a dissenting opinion.

The report, at page 9, announces that the case was decided at June Term, 1863. This is a mistake. It was decided at the prior March Term, having been argued the last time in the January Term. The remittitur was sent

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down from the Court of Appeals, on the 11th of April, 1863. It will be seen, by examining the reporter's own note, therefore, that the only circumstance of the case noticed by him, which really occurred in any connection with this case, is the absence of Judge SELDEN during the first argument, and he did not unite in the judgment. At page 14, the reporter states that the judges who sat in 1861, were "equally divided upon the question of fact—the testamentary capacity of Mr. Parish." There are many other varieties of opinion which might have prevented the concurrence of the number of judges required to pronounce a judgment. On the validity of the codicils, as on the authority of *Stewart v. Lispenard*, the opinions in this case stood as three to one.

In the preparation of this case for the present volume, it has been deemed advisable to give the points of counsel, on which the case was argued in the Court of Appeals.—REPORTER.

KINGS COUNTY—HON. JESSE C. SMITH, SURROGATE—May, 1853.

WARING v. WARING.

On an application that the executors file an inventory, and give security for the due administration of the estate, a motion for an order that the executors deposit with the surrogate the books of a copartnership composed of the deceased and one of the executors, so as to enable the next of kin to ascertain the amount of the interest of deceased in such copartnership, will not be granted. The surviving partner being entitled to the custody of the books of the firm, ought not to be compelled to give them up.

A. F. WARING and A. CRIST, for the Complainants.

JOHN A. LOTT, for the Executors.

THE SURROGATE.—The application in this case was by petition for two purposes.

One, that the executors file an inventory; and the other, that the circumstances of the executors were so precarious as not to afford adequate security for their due administration of the estate.

An answer to the petition was filed by both executors, denying most of the allegations on which the application is founded, and a replication has been put in to the answer.

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In this stage of the proceedings, a motion is made by the petitioners for an order to compel the executors to produce and deposit for inspection in the surrogate's office, the books of account of the late firm of Henry Waring & Son, which consisted of the deceased and his son Henry P. Waring, one of the executors.

It is alleged in the petition, that the deceased and his said copartner had previous to, and up to the time of the death of the testator, been engaged in mercantile business under said firm-name; that the executors refused to permit the appraisers to examine the books and effects of the firm; that the executors presented to the appraisers a paper in which they stated the interest of the deceased in said firm to be about \$1,000; that Henry P. Waring, one of the executors, has entered or caused to be entered, on the copartnership books, accounts and charges against the deceased to the amount of several thousand dollars; that the petitioners are unable to give the particulars of the charges, for the reason that said books and accounts are under the exclusive control of said Henry P. Waring; that said several thousand dollars has been improperly charged, and the petitioners are informed and believe, that upon a settlement of the accounts of the late firm, Henry P. Waring will be found greatly indebted and in arrear to said estate.

Upon this state of facts, the most of which are denied by the answers of the executors, the petitioners ask to have the books of account of the late firm deposited in court for examination, for the purpose of enabling the petitioners to show that Henry P. Waring is a large debtor to the firm, or to the estate of Henry Waring, deceased.

Under the powers conferred by 2 *Rev. Stat.*, 220, and the amendments thereto made by the law of 1837, the surrogate may direct and control the conduct of executors to the extent claimed by the petitioners, when the question is so presented to him that it would become properly incidental and necessary to carry out a proceeding authorized by law. It may be that the establishment of an indebtedness from Henry P.

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Waring to the estate, would tend to prove the issue raised in this matter: that the circumstances of the executors are so precarious as not to afford adequate security for their due administration of the estate. But it does not appear to me so important and necessary to that purpose, as in this collateral proceeding to require an investigation of the state of the accounts between Henry P. Waring and the late firm of Henry Waring & Son.

2 *Rev. Stat.*, 221, § 6, does not sustain nor give weight to the claim set up by the petitioners. The power there given to the surrogate is clearly confined, in subdivision 1, to the production of papers material to any inquiries pending in the Surrogate's Court by subpoena. No other reading can be made of this subdivision. But, independent of, and aside from, these considerations, it appears to me that there is another insuperable objection to this application in this form. Henry P. Waring is the surviving partner of the late firm of Henry Waring & Son. As such surviving partner, he "is entitled to all the choses in action, and other evidences of debt belonging to the firm. They must be collected in his name, and he is entitled to the exclusive custody and control of them. The books of account are incidents to the debts and choses in action, and whoever is entitled to the one, is, of course, to the other." (*Murray v. Mumford*, 6 *Cow.*, 441.)

He is the trustee for the creditors of the firm, and the debts of that firm must first be paid before any thing can come to the estate of Henry Waring, the deceased partner. Should, then, the books of account be taken from the custody of the surviving partner upon a proceeding like this? In a proper proceeding, and on a proper application, where the examination of these books of account would be clearly material to the inquiry in issue, they should be produced before the court. But I cannot think that it would be proper at this time, and upon this issue in its present condition, and upon an application in this form, to order these books to be deposited in court.

IN RE WILLIAMS.

KINGS COUNTY—HON. JESSE C. SMITH, SURROGATE—1888.

*In re WILLIAMS.**

In the Matter of the accounting of LUCY A. WILLIAMS, *executrix, &c., of the Last Will and Testament of* R. G. WILLIAMS, *deceased.*

The testator had purchased for his wife certain real estate which she held in her own name, subject to the joint bond of the husband and wife, and to the wife's mortgage for the purchase-money. The widow as executrix, paid off the bond with the funds of the estate;—*Held*, that she was not entitled, on an accounting, to be credited for the amount thus paid.

Parol evidence that at the time of making the bond and mortgage, and subsequently, the testator declared his intention to pay off the incumbrance, and give the property to his wife unincumbered,—*Held*, inadmissible.

The will directed the whole estate to be converted into money, and, among other provisions, out of the fund, directed a certain sum to be invested, the interest of which was to be paid to the wife, but without expressing it to be in lieu of dower; and another sum to be invested, and the interest paid to his adopted daughter.

Held, 1. That whether these provisions are legacies or annuities, they are general, and are subject to abatement with the other general legacies of the will.

2. That no time being stated for the payment of the interest to the widow and adopted daughter, the widow is not entitled to interest until one year from the granting of letters; but that the adopted daughter is entitled to interest from the death of the testator, he standing in *loco parentis*, and there being no other provision for her maintenance.

LUCIEN BIRDBYTE, *for widow, executrix, and legatee.*

A. C. BRADLEY, *for executor and legatee.*

THE SURROGATE.—The testator devised and bequeathed to his wife his household furniture, gold watch, silver plate, horses, carriages, harness, &c., and also his right, title, and interest, if any he had, in the house and two lots occupied by

* Reported in 13 *N. Y. Leg. Obs.*, 179.

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him in Pacific-street, Brooklyn, at the time of his death. To the heirs of his brother, Milo Williams, he devised a farm in Oswego county. To his brother, Isaac Newton Williams, he devised another farm, and to his brothers he bequeathed his wearing apparel.

He then ordered and directed his executors to sell and dispose of all the remainder of his property, real and personal, and to convert the same into money, thereby authorizing them to convey any of his real estate, and after paying all his just debts, and testamentary expenses, to apply and dispose of the same as follows :

To invest \$15,000, and pay the interest semi-annually to his wife, during her life. In like manner to invest \$5,000, and pay the interest to Ann Eliza Denison, an adopted daughter of the testator, during her life, and to invest \$2,000, and pay the interest to his mother, for life; the like sum, and pay the interest to his brother, Milo Williams, for life, and the like sum, and pay the interest for the support of his brother, Emilus Williams, and to pay pecuniary legacies for different amounts to his brothers, and to the relations of the wife of the deceased, and to religious and charitable societies, in all to the amount of \$31,000; to appropriate \$1,000 for the erection of a monument, and the remainder of his property he left to be appropriated according to the discretion of his said executors, and he nominated and appointed his wife, Lucy Ann Williams, executrix, and his brother, Charles Byron Williams, executor of his will.

The testator in his lifetime, and within a year of his death, purchased some real estate in the city of Brooklyn, from Hosea Webster, upon which he paid \$1,250, cash, and was to give a mortgage for \$3,750 of the purchase-money, with a bond payable in one year, or at any time within the year, upon thirty days' notice. After the deed had been drawn directly to the testator, at his request another deed was drawn and executed by Hosea Webster, directly to Lucy Ann Williams, the wife of the testator, and a joint bond was made by the testator and his wife, with the mortgage of the wife to secure

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the \$3,750. In this condition the property remained until the decease of the testator, the title standing in the name of Lucy Ann Williams, subject to the mortgage of \$3,750, for which the testator and wife had given their joint bond.

After taking out letters testamentary, the executrix paid off the bond with the funds of the estate, cancelled the mortgage, and now claims to have the payment allowed in her account as executrix. To this, the co-executor, Charles Byron Williams, who is also a legatee under the will, objected.

The counsel for the widow offered to prove by Cyrus P. Smith, Esq., and the Rev. Dr. Spear, that the testator, at the time he purchased the real estate in question, and subsequently thereto, stated that he intended to give it to his wife, and to build a house upon it for her; that he gave the mortgage for a short time, because he had not the money to spare from his business at that time, and that he intended to pay off the same, and was making arrangements so to do, at the time of his death. This testimony was objected to, on the ground that it was not competent to show by parol testimony the intention of the parties in the transaction which resulted in the execution of the deed and of the bond and mortgage.

On the other hand it was insisted, on the ground that the transaction made the testator the principal, and his wife the surety, that the testimony was admissible for the purpose of showing that such was the relation between the parties. It did not appear to me that the testimony was admissible as a part of the transaction, nor for the purpose of showing the relation claimed between the parties of principal and surety, so as to bring the case within the authorities of *Sisson v. Barrett* (6 Barb., 199; S. C., 2 N. Y. [2 Comst.], 406) and *Robison v. Lyle* (10 Barb., 512).

I, therefore, refused to admit the testimony, and reserved the question whether the executrix should be allowed a credit for the payment of the bond.

On the argument upon the final submission of this case to me, three questions were fully and ably discussed by the learned counsel for both parties.

IN RE WILLIAMS.

First. Whether the credit of \$3,897.50 in the account of the executrix for the payment of the joint bond of the testator and herself, should be allowed.

Second. Whether the bequests in the will to the widow, of the interest and income of \$15,000 during her life, and of the interest and income of the \$5,000 to the adopted daughter of the testator, should abate with the pecuniary legacies in the will of the testator; and

Third. From what time interest is to be allowed to the widow and adopted daughter upon the said bequests or legacies.

In regard to the question whether the credit of \$3,897.50 in the account of the executrix for the payment of the joint bond of the testator and herself to Hosca Webster, should be allowed, I do not think, under our present statutes, that the general direction in a will to pay all the just debts of the testator, without any expression showing an intent to pay debts secured by mortgage, can be held to embrace this latter class of debts. It is in effect as if the testator had said nothing about the payment of his debts. The law requires the payment of all just debts, except those secured by mortgage, before any legacies can be paid, and the provisions (1 *Rev. Stat.*, 749, § 4, and 2 *Rev. Stat.*, 102, § 14, subd. 2) point out the course to be pursued in the payment of debts upon the settlement of estates. Under these provisions, it appears to me that the debts secured by mortgage until a foreclosure and a deficiency found, are not to be regarded as debts to be paid in the course of administration, unless they are expressly or by implication so directed in the will.

It is said, however, that a married woman cannot make a bond, and that the joint bond of the husband and wife in law, is the debt of the husband. This, as a proposition of law, is undoubtedly true; but it has been held in equity, that a wife may join in a bond to charge her separate estate. (*Hulme v. Tenant*, 1 *Bro. C. C.*, 15; *S. C.*, 2 *Dick.*, 560; *Pybus v. Smith*, 1 *Ves., Jr.*, 189; *S. C.*, 3 *Bro. C. C.*, 340; *Standford v. Marshall*, 2 *Atk.*, 69.)

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This being a contract in reference to the consideration-money for the purchase of the property which was conveyed to her as her separate estate, I cannot see why she could not make this bond to be valid and binding as against her estate; and though it is true that if the holder of the bond had sued the executors of the testator in a court of law, a judgment would have been paid out of the personal assets of the deceased; yet, as between the legatees under the will of the deceased and the executrix, they could have compelled her to pay the bond so secured by her mortgage, out of the real estate pledged for its security.

I have not been able, after listening to the able arguments of counsel and a close examination of the authorities cited, to divest myself of the strong impression made upon my mind, that the transaction in reference to this real estate amounted to this: That the testator gave to his wife the title, subject to the incumbrance of the mortgage upon it given for a part of the purchase-money, and however clear may have been his intention to pay off this bond during his lifetime, so as to give to his wife the property free from incumbrances, yet having failed to accomplish his purpose, the gift was incomplete at his death, and must be so considered and treated on this accounting, and the executors cannot be called upon to complete the gift. (*Williams on Executors*, last ed., 1505, and cases in note; *Cotteen v. Missing*, 1 *Mad-dock*, 176.)

Viewed in this light, it seems to me that instead of the wife or her property being surety to the husband, the husband by uniting in the bond to pay a portion of the purchase-money which was charged as an incumbrance on the estate of the wife, became the surety of the wife in aid of her estate; and therefore the authorities of *Niemcewicz v. Gahn* (3 *Paige*, 614), *Warner v. Price* (3 *Wend.*, 397), and others, cited by counsel for the executrix on this point, are not applicable to this case.

The next question is, whether the bequests in the will of the testator, to invest \$15,000 and pay the interest to his

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wife, semi-annually, during her life, and to pay to his adopted daughter, Ann Eliza Denison Williams, the interest of \$5,000 during her life, must abate with the general legacies given by the will, as it appears that there are not assets sufficient to pay the general legacies in full and to make these investments.

It is said by counsel for the widow and her adopted child, that these bequests are by law annuities, and are not, therefore, subject to abatement with the general legacies. In the view which I take of this matter, it is not decisive of the case whether we term these provisions for the widow and child annuities or legacies. They answer the most approved definition of annuities in this, that they are grants of certain sums of money to be paid by the representatives of the grantor at the expiration of fixed, consecutive periods, for life. (*Lumley's Law of Annuities*, 1.) They are also legacies, because they are gifts by a testator in a will wherein an executor is appointed, to be paid by the executors (2 *Williams on Ex.*, 905), and the principal to be invested to raise the semi-annual payments of interest, is to be taken from the body of the estate.

Perhaps the best definition to be given to these bequests, is, that they are legacies for life, with remainder over. (*Gibson v. Bott*, 7 *Ves.*, 96; 2 *Williams on Ex.*, last ed., 1193.)

The will provides that the executors are to sell and dispose of all the estate of the deceased, both real and personal; to convert the same into money, and out of the proceeds to set apart these several sums with others for investment, and to pay a large number of general legacies. The whole estate is to be converted into money, and to make one general fund, out of which the sums are to be set apart from which this income is to be raised and the general legacies are to be paid. The general legacies and the investments being charged alike upon the general fund, I do not see how we are to avoid the well-established rule, that these annuities or legacies for life are general legacies. (2 *Williams on Ex.*, 1172, last ed.; 1 *Roper on Legacies*, 203, ed. of 1848.)

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It was insisted, upon the argument by counsel for the executrix, that the authorities cited in *Williams on Executors*, at page 1172, to sustain the proposition that an annuity charged on the personal estate is a general legacy, do not sustain the proposition. I have examined them somewhat carefully, and can discover no cause for such a doctrine. But if I had come to the conclusion that they did not sustain the proposition, I should have distrusted my own judgment, after repeated recognitions of the doctrine in the best elementary writers upon the subject, and in the authorities from the English courts, cited in the note to *Williams on Executors*. As to the argument that those bequests are specific legacies, because they are charged on real estate, in the case of *Creed v. Creed* (11 *Clarke & Finn.*, 508), in the House of Lords, Lord COTTENHAM giving the judgment of the house, says, at page 510: "Their claims are pecuniary legacies charged indeed upon the land, upon a deficiency of the personality; but such a charge cannot alter the character of the legacies, or make them specific." It is claimed, however, that though these are general legacies, they do not abate, for the reason that as to the widow, the provision for her is in lieu of dower, and as to the adopted daughter of the deceased, it is for her support and maintenance. To entitle the widow to the benefit of the rule, it must appear expressly or by fair inference from the will itself, that the legacy is given in lieu of dower. It is not contended that there is any such expression in the will, but it is insisted that as the testator directs his estate, both real and personal, to be converted into money, for the purpose of making the investments for the widow and adopted daughter, and as the whole title to the real estate cannot be given without a release of dower by the widow, therefore the testator intended this bequest to the widow to be in lieu of dower. I do not see how any such intention is to be implied from the language of the will or from the character of the bequests. It has been decided (see 1 *Bright's Husband & Wife*, 558, 559, ed. 1850, and the authorities there cited), that no implication would arise from the circumstances that the es-

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tate was devised to the wife and other persons as trustees for sale, and the proceeds directed to form parts of the testator's personal estate, and benefits given to the widow out of the funds so constituted—sufficiently clear to oblige the widow to elect between her testamentary provision and dower in the lands; and the rule is the same in regard to the election of the provision in lieu of dower, as in reference to the question of non-abatement of the legacy of the widow. There must be a clear intention that the provision is in lieu of dower, to compel the election or to prevent the abatement of the general legacy. In the absence of any declaration or intention appearing in the will of the testator, or of any implications arising therefrom that the provision for the widow was in lieu of dower, and of any expression or implication that he intended to give a priority in the payment to the widow or adopted child of their several legacies, I do not see how it is possible to avoid the application of the rule, that these bequests, being general legacies, must abate with the other legacies in the will. (2 *Williams on Ex.*, 1171; 1 *Roper on Legacies*, 420, ed. of 1848.)

In regard to the question of interest, and the bequests to the widow and adopted daughter of the deceased, the statute provides (2 *Rev. Stat.*, 90, § 45), that after the expiration of one year from the granting of letters testamentary or of administration, the executors or administrators shall discharge the specific legacies bequeathed by any will, and pay the general legacies if there be assets; and if there be not sufficient assets, then an abatement of the general legacies shall be made in equal proportions. Nothing is said in the statute about interest. The well-established rule of law on this subject, is, that when no time is named, and in the absence of any contrary intention to be collected from the will, the legacy itself is payable at the end of the year from the testator's death; and if the executor do not pay it then, interest becomes due to the legatee from that period. (2 *Roper on Leg.*, 1251; 2 *Williams on Ex.*, 1222.)

If, then, these bequests are general legacies, or legacies for

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life, and of consequence not payable until the end of the year, no interest can be charged on them for the first year after the death of the testator, unless they are excepted from the above general rule. An exception is made where the testator is the parent, or is in *loco parentis*, of the legatee; that interest shall be allowed as a maintenance from the time of the death of the testator, if there is no other provision for that purpose. (2 *Williams on Es.*, 1226.) There is no other provision for the maintenance of Ann Eliza Denison Williams, the adopted daughter of the testator, except the payment to her during her natural life, of the interest and income of \$5,000. Under the above rule, therefore, she would be entitled to interest on the proportionate share of her legacy for life from the death of the testator. But the rule in reference to the wife of the testator, seems to be, that though she have no provision in the will for her support, unless the legacy is given to her in lieu of dower, she is not entitled to interest until one year after the death of the testator. (2 *Roper on Leg.*, 1272.) In this case, however, there is a provision in the will giving to the widow a specific legacy, and not an expression or intimation that the legacy for life is in lieu of dower; and besides, it appears that she is entitled to a dower-interest in lands specifically devised in the will, as well as in other lands devised to the executors, so that I do not see how, under any view of this question, she can be entitled to interest on her legacy for life until one year after the death of the testator.

In the case of *Craig v. Craig* (3 *Barb. Ch.*, 76), the interest on the annuity to the widow is saved because it is in lieu of dower; and the interest on the annuity to the lunatic son is saved by the rule that it is for the support and maintenance of the son of the deceased. (*Van Bramer v. Hoffman*, 2 *Johns. Cas.*, 200.)

- I have devoted much time and study to this case, with a continued hope that I should find some ground on which to relieve the widow of the testator from the position in law which the failure of assets to pay the legacies under the will

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of her deceased husband has placed her. There can be little doubt, that had the attention of the testator been called to the matter when he executed the will, whether he intended that the provision for his wife and adopted child should be preferred to the other general legacies, he would have said, unhesitatingly, that such was his desire. But I am not at liberty "to speculate upon what the testator might mean as to preferring a legacy on account of the object or purpose to which it is given." (1 *Roper on Leg.*, 421-425.) But I am to determine this case from the intention as expressed in the will. And applying well-settled rules of law to that instrument, I can come to no other conclusions than those already stated by me.

The result of my examination of the questions submitted to me, therefore, is—1st, That the executrix is not to be allowed a credit for the payment of the bond of the deceased to Hosea Webster; 2d, That the legacies for life to the widow and adopted daughter of the deceased are subject to abatement with the other general legacies in the will of the testator; 3d, That interest is to be allowed upon the amount to be set apart for the adopted daughter from the death of the testator; and 4th, That interest is to be allowed the widow on the amount to be invested for her benefit after one year from the date of the letters testamentary.

KINGS COUNTY—HON. JESSE C. SMITH, SURROGATE—May, 1853.

NEWHOUSE v. GALE.

*In the Matter of the administration of the Goods, &c., of
WILLIAM A. GODWIN, deceased.*

A legatee who is named as executor in a will which has been declared null and void by a decree of the surrogate, and who has appealed from such decree, has sufficient interest in the estate to enable him to make an ap-

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plication for the removal of the administratrix, on the ground of her marriage since her appointment.

The policy of the statute is against the appointment of married women as administratrices or guardians, and of their continuation in office after their marriage subsequent to the issuing of the letters; but it seems that such subsequent marriage of an administratrix is no ground for her removal where her husband files his consent to her continuance in office, and unites with her and the sureties in a new bond.

An appeal taken by an executor from a decree of the surrogate declaring the will null and void, stays all proceedings on the letters of administration subsequently granted to the widow, and no letters of collection can be issued upon them while the administration continues.

Held, therefore, that in order to enable letters of collection to be issued for the protection of the personal property pending the appeal, the letters of administration granted to the widow should be revoked.

The facts appear in the opinion.

GERARDUS CLARK, *for Newhouse, the legatee and executor.*

H. D. CULVER, *for the administratrix.*

THE SURROGATE.—In this case, letters of administration were granted to Mary A. Godwin, the widow of the deceased, after a decree refusing to admit to probate the instrument offered as the last will and testament of the deceased.

An appeal was taken by John Newhouse, a legatee and executor named in the will, from the decree of the surrogate. Since the granting of letters of administration to Mary A. Godwin, the widow, she intermarried with Anthony Gale.

Application was made by said John Newhouse to have the letters of administration revoked, because of the marriage.

Objection was made by counsel for the widow: 1st. That Mr. Newhouse had no interest in the estate which would authorize him under the statute to make the application; and 2d. The objection is sought to be removed by filing the consent of Anthony Gale, the husband, that his wife Mary may continue to act as such administratrix.

The first objection I do not think tenable. It is true that Mr. Newhouse would have no interest if the decision of the surrogate in rejecting the will is sustained. But inasmuch

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as the appeal suspends all proceedings under the decree of the surrogate, I think that the legatee named in the will offered for probate must be considered as having sufficient interest, until the decision of the surrogate is affirmed or reversed, to enable him to take this proceeding.

In regard to the main question; the statute provides that if an administratrix marries after being appointed administratrix, the surrogate, on the application of any person interested, shall have power to revoke such appointment. It does not in express terms say that the surrogate shall revoke for that cause. But I have considered the policy of the statute to be not only against the appointment of married women administratrices and guardians, but also against their continuance in office after marriage which takes place subsequent to the issuing of the letters.

The statute does not forbid their acting after marriage, when such marriage takes place subsequent to the issuing of letters; and from the examination of authorities on this subject, I should have no hesitation in continuing the administratrix upon filing the consent of her husband, and the execution of a new bond, in which he should unite with her and the sureties, if it were not for the position in which this matter is placed by reason of the appeal from the decree of the surrogate refusing to admit the will to probate.

In the case of *Hicks v. Hicks* (12 Barb., 322), the Supreme Court have held that the appeal in such a case stays all proceedings in the administration. If so, then the continuance of the letters would be of no service to the estate or to any parties interested therein, and I could not make the order to continue upon the consent of the husband; and inasmuch as no letters of collection can be issued to protect the personal property pending the appeal, while the letters of administration continue in force, I shall revoke the letters of administration heretofore issued to Mary A. Godwin, now Mary A. Gale, the widow of the deceased, to enable letters of collection to be issued.

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KINGS COUNTY—HON. JESSE C. SMITH, SURROGATE—September, 1864.

TURHUNE v. BROOKFIELD.

*In the Matter of the probate of the Last Will and Testament
of JAMES MALCOLM, deceased.*

A legatee under a will made prior to the one offered for probate, who is neither an heir-at-law nor next of kin of the deceased, may intervene to oppose the probate of the subsequent will.

Where suspicions of undue influence are created by reason of the advanced age, blindness, and imbecility of the testator,—*Held*, that a presumption is raised against the will, which requires that they be removed by clear and satisfactory evidence, beyond the mere fact of the existence of the will and the capability of the testator.

Held, further, that such presumption is satisfactorily removed by proof of the instructions given by the testator in regard to the drawing of his will; that the same was carefully read and explained to him at the time of its execution; and that he subsequently declared every thing was arranged to his satisfaction.

J. H. & H. L. RIKER, *for executors.*

SANDFORD & BILLINGS, *for Ann Tilar, in support of the will.*

JOHN A. LOTT, *for Hannah Brookfield, in opposition.*

THE SURROGATE.—Upon the return of the citation, Hannah Brookfield appeared by her counsel and claimed the right to intervene and oppose the probate of the will, on the ground that she was a legatee under a former will, as well as under the one now offered for probate. Upon the production of the former will, and the proof that it was executed by the testator in the form prescribed by law, the legatee has sufficient interest to entitle her to intervene and to oppose the probate of the will offered.

[The learned surrogate proceeded to discuss the competency of a witness, who was objected to at the trial, on the part of the executors, on the ground of interest. As the late amendments of section 399 of the Code of Procedure have removed,

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in great part, the disability of witnesses on the ground of interest, it is deemed advisable to omit that part of the surrogate's decision.]

I do not understand the counsel in opposition to the will offered for probate, to contend that the testimony in this case shows affirmatively that the testator was incompetent to make a will at the time when the instrument offered for probate was executed. But he insists that the testator was incompetent at the time he left the house of Mr. Hick to go to Mrs. Titlar's; that he was close and penurious; that he was placed in a condition where Mrs. Titlar and her friends could exercise an unlawful control over the testator; and that the facts in evidence show that undue influence was exercised, so that the will offered for probate was not the free and unrestrained act of the testator.

Proof of the due execution and publication of a will is presumptive evidence that the testator knows the contents of it. (1 *Jurm. on Wills*, ed. of 1849, 47.) It is also held, that though the factum be proved and the testator be capable, yet circumstances will be sufficient to create a case of suspicion, and warrant a presumption against the will, so as to require that the presumption be removed by clear and satisfactory evidence, beyond the mere fact of the existence of the instrument. (*Von Slentz v. Comyn*, 12 *Irish Eq. R.*, 622.)

The testator being blind, or nearly so, besides the proof of execution and publication, it is incumbent on the propounders of the will, in some way, to show to the satisfaction of the court that the testator knew the contents of the instrument offered for probate, and was not imposed upon.

To make the application of the facts in this case to these rules of law, and to come to a correct conclusion whether the testator understood the contents of the paper offered for probate, and whether he executed the same as his own free and unrestrained act, it will be necessary to inquire,

First. Whether the testator, at the time he executed that paper on the 29th of June, 1853, had sufficient capacity to make a will; and

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Second. Whether an undue influence was exercised on him, so that the instrument offered is not his will.

In regard to the question of capacity, I shall not go over the testimony on that point, but it seems to me that the evidence of the subscribing witnesses to the will, together with that of Dr. Donne and the other witnesses in support of the will, greatly outweighs that of the witnesses produced in opposition to the will. Besides this, the witnesses offered in support of the will on that point are entitled to greater consideration than the majority of witnesses called to show a want of capacity, for the reason that the former have no pecuniary interest, immediately or remote, in the result of the question at issue, while the latter have most of them an interest in the question, which, though it does not legally disqualify them on the ground of interest in the immediate result, may nevertheless be very properly taken into account as going to their credit. I cannot doubt, that if the only question in the case was a question of capacity, the testator was, on the 29th of June, 1853, possessed of sufficient mind, memory, and understanding, to make and execute a valid will.

But upon the question of capacity, as connected with that of influence, it appears that the testator was an aged man, laboring under the infirmities of disease and of blindness; suffering from bereavement from the loss of his second wife; without family or next of kin; left to seek a home among the connections of his two deceased wives; and though independent in regard to his condition in life, yet he was dependent to a large extent upon those around him for enjoyment.

Under these circumstances, it is quite natural that a will made by the deceased should partake to a greater or less degree of the character of the influences surrounding him at the time of its execution. That the condition of the mind of the testator was such, that during the last nine months of his life he was subject to a greater or less extent to such influences, is apparent from the character and contents of the codicil of February 17th, 1853, and of the will offered for

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probate. In the examination of this case, it will be borne in mind that the deceased, after the death of his wife, had no family, no relations, nor next of kin for whom he was bound to provide. The relatives of his two wives, who are the legatees and devisees under his will, had no legal claim upon his estate, and the provision for them is voluntary.

If, therefore, the testator has preferred one of these families to the other, or any member of either family to others of the same family, no argument can be drawn from the act itself that it is contrary to the natural affections or to the legal obligations of the testator.

The first will, which was executed immediately after the death of his last wife, after giving specific legacies to the amount of \$2,200, divided the residue equally between the families or relatives of his two wives. It appears that the testator, at the time that he made the first will, was about to leave the city of New York and to take up his residence with Mr. Brookfield, at Morristown. Mrs. Titlar said he should not go until he made his will, and he did not go until he made it. This circumstance is claimed by the counsel in opposition to the will, to be the main starting-point in the evidence of undue influence on the part of Mrs. Titlar over the testator. That will was drawn by John H. Riker, Esq., who was sent for by Mrs. Titlar. Yet the person sent was Joseph D. Bonsall, a member of the family of the last wife of the testator, whose interest was opposed to that of Mrs. Titlar, and the will itself furnishes no evidence of undue influence on the part of Mrs. Titlar, as it gives her only \$100, and was made while some of the members of both families were present at the house of the testator. Upon the return of the testator to the city of New York, at the house of Mr. Hick, feeling the loneliness of his situation, he consented to have an operation upon his eyes, for a cataract; with a hope, if possible, to restore his sight so as to enable him to read. After the operation upon his eyes, he appears to have desired to make some alteration in his will. The will was sent for, and Mr. Riker, his counsel, requested to call and take instruc-

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tions to draw the alterations. His counsel advised him to wait until he got over the excitement occasioned by the operation on his eyes. But the testator being impatient to execute the codicil, sent for Mr. Disosway, the counsel of Jonathan Hick, and had a codicil drawn, which was executed. By this codicil an important change was made in the disposition of the property of the testator. Nearly one-quarter of the estate was taken from Peter Titlar and Ann Titlar, a brother and sister of his first wife, and transferred to the Hick family; thus giving to that family nearly three-fourths of the entire estate of the testator.

It is not strange, after the knowledge of the contents of this codicil came to the ears of the members of the Titlar family, that they should have been desirous to bring the testator into a position where he might reconsider his bounties, and dispense them with a different hand.

A plan was accordingly set on foot by Mrs. Titlar and her friends, Messrs. Turhune and Hope, who were also old and tried associates of the testator, to get this aged and somewhat infirm man away from the house of Hick, and to have him under the shelter of the roof of the Titlars. After some negotiations and personal interviews between these old friends, this object was accomplished; and the deceased was, on the 8th of June, 1853, safely within the walls of the house of Mrs. Titlar, in Williamsburgh. I speak of these matters as facts appearing in evidence in this case. Whether the motives which induced the change of residence was the desire to make the old man contented and more comfortable in his last days, or the more sordid wish to get him within the influence of that branch of the family, so as to bring about an alteration in his will, it is not so material to inquire, as it is to learn whether the change of residence, with other appliances, had the effect to produce such an influence over the mind of this old man, that the will which he made on the 28th of June, 1853, was not his will, but that of Mrs. Titlar and her friends.

In regard to the contents of this last will, the specific lega-

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cies are increased from \$2,200 to about \$11,800, including the value of the house and lot devised to Mrs. Titlar, so that the residuary estate is much less than it was under the first will, or under the first will and codicil. This residuum being divided into eighteen parts, and eight given to the Titlar family and ten to the Hick family, the final result is, that the Titlars' receive between \$26,000 and \$27,000, and the Hicks' between \$21,000 and \$22,000. Now it is more than probable that the deceased was influenced by Mrs. Titlar and her friends to make this last will more decidedly in her favor than the first will, or the first will and codicil. But the question to be decided, is, whether there is evidence sufficient to show an undue influence so as to vitiate the will.

"It is not unlawful for a person by honest intercession and persuasion to procure a will in favor of himself or another person, neither is it, to induce the testator by fair and flattering speeches; for though persuasion may be employed to influence the dispositions in a will, this does not amount to influence in the legal sense. And whether or not a capricious partiality has been shown, the court will not inquire." (1 *Jarm. on Wills*, 37.)

It will be seen by an examination of the contents of the first and last wills, that although by the first will seven members of the Hick family were to receive over \$800 each more than they would receive under the last will, yet the aggregate amount given to the Hick family by the last will is only some \$2,600 or \$2,700 less than the aggregate amount given to that family by the first will. And that the gross amount given to the Titlar family under the last will is but a little over \$2,000 more than was given to the same family under the first will. This near approximation to equality between the two families is brought about mainly by giving to the executors \$500, and to the children of John Bonsall over \$3,000 additional legacies.

It is said that the change in the last will, giving to Mrs. Titlar the legacy of \$2,000 in place of \$100 in the first will, and the devise of the house and lot in Allen-street to her, is

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evidence that the testator was acting under undue influence, exercised by Mrs. Titlar over the testator while he was under her roof. Such a change Mrs. Titlar was undoubtedly interested in and sought to bring about. But there is another material change in the last will, in giving to the children of John Bonsall the additional \$3,000 in which she had no interest. It does not appear that either Mrs. Titlar or her friends had any wish or desire that this last change should be made, or that they took any concern in the distribution of that portion of the property of the deceased which was to go to the different members of the Hick and Bonsall families. The reason why the shares of the residuary estate of the deceased were taken from Ann and Peter Titlar, both in the codicil and in the last will, appears from the declaration of the testator that he did not consider himself under any obligations to them; and the reason why he makes the devise of the house and lot in Allen-street to Mrs. Titlar, in the last will, is stated in the will itself, that he expected to pass the residue of his life under the care and attention of Mrs. Titlar. He gave the specific legacies of \$250 to the child and grandchild of Reuben Hope, probably at the request of his old friend and partner, Reuben Hope, for whom he desired, if necessary, to make some provision in his will, and to whom he sent to inquire how it fared with him in the world. It is not apparent why the specific legacies of \$500 in the codicil and last will to Francis Kirk, and of \$500 in the last will to Harriet Wild, were inserted; nor why the radical change was made in favor of the children of John Bonsall. Neither is there any explanation why, in the last will, the residuary estate is first divided into eighteen parts, and then distributed in unequal portions; the largest portion having been given to the Hick family.

If, however, the testator was competent to make a will, and has made it without improper influence, it is not necessary to inquire the reason why he made this or that provision.

His will stands as a reason for his acts. But the facts appearing from the will of the change in favor of John Bon-

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all's children, and of the division of the residuary estate so entirely different from the former will and codicil, and yet so as nearly to restore the equilibrium between the Hick and Titlar families, in the absence of any proof whatever that these changes were brought about or induced by any person interested for either family, goes far to show that the instrument offered for probate is the last will and testament of the testator, rather than that of Mrs. Titlar and her friends, who were charged with the getting up and making of this will.

The case of *McSorley v. McSorley* (2 *Bradf.*, 188) was a very different case from the one under consideration. In that case, the will was prepared without instructions, at the suggestion of friends, when the testator was totally insensible. On a partial recovery no effort was made to effect its execution; and, on a relapse, "when he was much worse and not expected to live, and was just on the point of death," it was executed without his being able to say any thing more than "yes," to the questions put to him on its execution. The surrogate held, that, under these circumstances, and in the absence of any clear and satisfactory proof of *instructions* and *intentions*, probate must be denied. And in summing up the evidence, at pages 198 and 199, he shows that the character of the mind of the deceased was greatly inferior to that of the testator James Malcolm.

In this case, the deliberation with which the instructions were given to Mr. Riker, who drew the will, and the care which was taken by him to read and explain the will to the testator, show an entirely different state of facts from the case of *McSorley v. McSorley*, and present affirmative proof to rebut any presumptions arising from the condition of the testator as to his health, his imbecility of mind, and to surrounding influences.

In the case of *Mowry v. Silber* (2 *Bradf.*, 133), cited by counsel in opposition to the will, the counsel who drew the will, and was also a subscribing witness to it, was comparatively a stranger to the deceased. He took his instructions from him, and thought him competent. The will gave to a

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daughter, with whom the deceased was residing at Newark, nearly one-half of the estate of deceased, to the exclusion of other children. This was shown to be contrary to his former intentions, and no satisfactory evidence was given to show that, in his weak condition of mind, he was not unduly biassed or influenced to the performance of an act discordant with his previous intentions. In the case under consideration, as I have before stated, the testator had no children or next of kin that he was bound to provide for. He had not expressed his determination to do otherwise than he did, by his last will, except that in his first will he declared his intention to divide the body of his estate equally between the relatives of his two wives. I have shown how nearly this intention is carried out in the last will, by the change in the division of the residuary estate, and the additional legacies to the children of John Bonsall. Besides this, the will in this case was drawn by counsel intimately acquainted with the deceased, who had transacted his business for thirty years, who knew well his character and the state of his mind; and who testifies, with great clearness and with decided knowledge, that the testator was not only of sufficient ability to make a will, but that he perfectly understood the contents and executed the same freely and without restraint. In both the other cases cited by counsel in opposition to the will, to show the rule of law to be that, when suspicion is excited, it is incumbent on the propounder to show affirmatively that the deceased acted with intelligence and comprehended the effect of what he was doing, the wills offered for probate were sustained,—*Burger v. Hill* (1 *Bradf.*, 360), and *Moore v. Moore* (2 *Id.*, 261). And certainly if the surrogate found sufficient testimony in those two cases to remove the presumption, I can have no hesitation in this matter.

In the case of *Barry v. Butlin* (2 *Moore's Cases*, 480), the will was drawn by a person interested, and the testator was of doubtful capacity; the will cut off the only son of the testator, and yet it was sustained. Baron PARKE says: "We think, therefore, on the whole, that the evidence of the factum,

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coupled with the strong probabilities of the case, is sufficient to remove the suspicions which naturally belong to the case of all wills prepared by persons in their own favor, especially when made by those of weak capacity. The undue influence, and the importunity which, if they are to defeat a will, must be of the nature of fraud or duress, exercised on a mind in a state of debility, are insinuated, but not proved."

In the case of *Von Stents v. Comyn* (12 *Irish Eq. R.*, 622), the will cut off sons and gave to a daughter. It was drawn in Vienna, while the daughter was present and the sons absent. The husband of the daughter of the deceased was the executor. The testatrix was in poor health and died soon after the will was made. No proof was given, except proof of the signatures of the subscribing witnesses. The court held, that the circumstances of the case were sufficient to excite suspicion, which ought to be removed, and there being no evidence to remove the suspicion, the will was refused probate; and in giving the decision of the court, this rule is laid down, that "when undue influence, importunity, or coercion, are objected, it is not enough to show merely their existence or the testator's liability to them, but the party must go on to satisfy the court that the testamentary act was obtained by means of them."

The case of *Stulz v. Schaeffle*, decided in the Prerogative Court in England, in 1852 (18 *Eng. Law & Eq. R.*, 576), has many features similar to the case under consideration, and the decision of Dr. Lushington brings out and applies the principles of law applicable to this class of cases in such manner as materially to aid in the examination of this case. The distinction between control and undue influence, and the kind of importunity necessary to invalidate a will, are so clearly and ably set forth in that decision that I have cited the case as in point, in this matter.

The conclusions to which I have arrived in this case are, that the circumstances of the age, want of sight, loneliness, and imbecility of the testator; his situation at the house of Mrs. Titlar, his dependence upon her, and his confidence in

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his old friends and associates, Mr. Turhune and Mr. Hope, and the change made by the liberal provision in the last will in favor of Mrs. Titlar, against the natural inclination of a close and penurious man, impose upon the propounders of this will the burden of removing the suspicions excited by those circumstances, and of satisfying the court that the will offered for probate is the free will of a capable testator :

That the inference of undue influence to be drawn from the occurrences which took place at the funeral of Mrs. Malcolm ; from the obtaining of the will of the deceased before he went to New Jersey ; from the acts of the parties in getting Mr. Malcolm from the house of Mr. Hick to the house of Mrs. Titlar, in Williamsburgh ; from the refusal to permit the relatives to see the deceased while at Mrs. Titlar's ; from the efforts of Mr. Turhune and Mr. Hope to procure this last will ; from the declarations of Mrs. Titlar that she was secured ; and from other circumstances introduced in opposition to this will, is rebutted and overcome by the evidence of the witnesses who drew the will and attended the execution, who took their instructions entirely from the testator, and prepared the instrument according to those instructions in such manner, as to show beyond reasonable doubt, I think, that these directions emanated from the testator, and were the work of his own free will ; and by the testimony of the witnesses as to the improvement of the health of the testator, after he went to Williamsburgh, as to his condition while there, and as to his declarations after making the will, that he had arranged every thing to his satisfaction.

On the whole case, I am satisfied that the suspicions excited in reference to this will, are satisfactorily removed, and that the instrument offered for probate is the last will and testament of James Malcolm, deceased.

I shall, therefore, admit the same to probate as a valid will of real and personal estate.

IN RE ROGERS.

KINGS COUNTY—HON. JESSE C. SMITH, SURROGATE—March, 1852.

*In re ROGERS.**

*In the Matter of the final accounting of JONATHAN ROGERS,
administrator of DAVID DUNHAM, deceased.*

An administrator or executor who neglects to take proceedings provided by statute to prove his debt or claim against the estate of the deceased for more than ten years, is barred by the Statute of Limitations.

The Legislature having required him to make proof of his claim, before he can retain in satisfaction of his own claim, the same vigilance should be required from him in establishing his claim as from any other creditor of the estate.

Letters of administration were granted October 31, 1836, and an inventory was filed on the 12th day of January, 1837. An order to advertise for claims was made in June of the same year, and notice published for six months. No further proceedings were had in the Surrogate's Court, or elsewhere, for an account or distribution, until October, 1850, when one of the next of kin applied for an order requiring an accounting by the administrator. In presenting the account, the administrator made a claim against the estate of \$651.94, with interest, for work, labor, and materials, done and furnished the intestate in his lifetime. It was claimed by counsel for next of kin that the debt was barred by the Statute of Limitations.

JOHN P. ROLFE, *for administrator.*

ALGERO G. HAMMOND, *for the next of kin.*

THE SURROGATE.—Previous to the Revised Statutes an executor or administrator had a right to retain for his own debt due to him from the deceased in preference to all other creditors of equal degree. (2 *Williams on Ex.*, 894, 895; *Rogers v. Rogers*, 3 *Wend.*, 503.) This right was given him from

* Reported in 11 *N. Y. Leg. Obs.*, 245.

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necessity, because he could not sue himself, and the law intended to place him in the same situation as if he had sued himself as executor or administrator and recovered his debt, but it did not give him the right to retain against other creditors of a superior order. In *Williams on Ex.* (904), it is held that an executor or administrator might retain for a debt due to himself, though it be more than six years old. But in the case of *Rogers v. Rogers* (3 *Wend.*, 503), the Court of Errors of this State held that he could not retain a debt which he could not recover as creditor simply, and not as executor.

Under that decision, however, it was held to be necessary that the statute limitation should have run out before the death of the testator. By the Revised Statutes (2 *Rev. Stat.*, 88, § 33) it is provided that no part of the property of the deceased shall be retained by an executor or administrator in satisfaction of his own debt or claim until it shall have been proved to and allowed by the surrogate; and such debt or claim shall not be entitled to any preference over others of the same class.

In the Session Laws of 1837 (ch. 460, § 37), the Legislature provides the manner in which such debt or claim shall be proved to and allowed by the surrogate. By this provision the executor or administrator has the option to take a proceeding expressly for the purpose of proving his claim upon citing the proper parties, or to prove his claim upon his final accounting. The first proceeding is seldom resorted to, from the difficulty of ascertaining who are the proper persons to be cited, and the latter plan is usually adopted.

But in either case it will be observed that the statute requires the proceeding to be taken by the executor or administrator himself; and there is no provision in the statute by which the executor or administrator can be compelled by a creditor, legatee, or next of kin, to take the proceeding to prove his claim, or for a final accounting.

The Statute of Limitations nowhere in express terms applies to Surrogates' Courts.

But it was frequently held before the Revised Statutes

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that though the former Statute of Limitations did not in terms apply to a court of equity, yet that court had always been considered within the spirit and meaning of the statute; and it was said that courts of equity followed the law, and acted not merely by analogy, but in obedience to the statute. (*Hovenden v. Lord Annesley*, 2 Sch. & L., 630, 631; *Kane v. Bloodgood*, 7 Johns. Ch., 90; *Murray v. Coster*, 20 Johns., 585; *Bertine v. Varian*, 1 Edw., 343.) And in a later case of appeal to the chancellor from the Surrogate's Court of the City and County of New York (*McCartee v. Camel*, 1 Barb. Ch., 455), where the Statute of Limitations was interposed in a proceeding by one of the next of kin, to compel the administrator to account and pay over a distributive share, the chancellor held that in analogy to the Statute of Limitations, suits by creditors, legatees, or distributees, before a surrogate, to obtain payment of their debts, legacies, or distributive shares, should be instituted within the time in which suits of the same character are required to be commenced in the courts of law and equity; and the learned chancellor says: "The statute does not in terms specify the time within which a creditor, legatee, or distributee shall institute a suit before the surrogate against executors or administrators to obtain payment of his debt or legacy, or his distributive share. But the Legislature never could have intended to give a party the right to institute such a suit before a surrogate, after his remedy was barred by the Statute of Limitations in all other courts."

It is true that there is a difference between that case and the question now submitted. There the party had a concurrent remedy in a court of law or equity; while in this case I know of no remedy by action in any other court to enable an executor or administrator to prove his claim. And it has been held by the surrogate of the city and county of New York in *Paff v. Kinney* (1 Bradf., 1), that the Statute of Limitations would apply to proceedings in the Surrogate's Court, though the party had no concurrent remedy in any other court.

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In this case it has been in the power of the administrator, at any time after eighteen months from the issuing of his letters of administration, to have taken this proceeding for a final settlement of his accounts, upon which he might and should have proved his claim. Or he could have obtained a citation for the purpose of proving his claim at any time after the issuing of his letters. The Legislature having required him to make proof of his claim before he can retain in satisfaction of his own debt, the same vigilance should be required from him in establishing his claim as from any other creditor of the estate. And he having neglected to take any proceedings for that purpose for more than thirteen years, has been guilty of great laches and is barred from the recovery of his claim against the estate of the deceased.

NEW YORK COUNTY—HON. CHARLES McVEAN, SURROGATE—1847.

In re SCOTT.*

In the Matter of the final settlement of the accounts of JOEL S. OATMAN, executor of JAMES SCOTT, deceased.

An executor has the authority, as the successor and legal representative, to sell a debt of the testator; and such sale having been made in good faith, prudently and discreetly,—*Held*, that he should not, in equity, be held liable for more than he received.

Medical attendance upon the deceased being valuable, the law presumes a promise to pay, and in order to defeat the claim, affirmative evidence that such service was gratuitously rendered must be produced.

P. REYNOLDS, *for the executor.*

H. M. WESTERN, *for legatees.*

THE SURROGATE.—The executor submitted his final account of proceedings, including also a personal claim against the

* Reported in 5 N. Y. Leg. Obs., 373.

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estate of the testator, for allowance and settlement. The residuary legatee—the widow being now deceased—contested both the account and the claim; and the proofs having been taken before me, I am now called upon to decide the matter in controversy.

The testator by his will gave the use and interest of all his property to his wife during her lifetime, and so much of the principal as might be necessary for her support. The property which the testator left was a judgment for \$985.36 against Jane Hays, recovered a few days previous to his death. A few days after his death, a bill in chancery was filed in the name of the executor, in aid of the recovery of that judgment, by the attorneys of the testator, in which bill several other creditors of Jane Hays were parties, and which was filed without consultation with the executor. All the creditors afterwards settled the suit, some receiving more in proportion than the others, each having made a separate settlement. The amount recovered by the executor was \$600 and the costs, and the judgment was assigned to a friend.

The propriety of this settlement has been questioned, and the evidence of the counsel of the parties in that controversy, and of others, has been taken on this hearing. As a matter of fact, I am satisfied, considering the litigation that would ensue the prosecution of that bill before the debt could probably be recovered, and the poverty of the estate of the testator otherwise, that the settlement was made prudently, in good faith, and that the best interests of the estate were thereby promoted.

The question has been raised whether an executor has the authority to release a debt due the estate or to sell it, and if he has so released or sold the same, whether he be not liable for the whole sum of the debt in his account. The counsel for the executor has referred to the 25th section of the statute (2 *Rev. Stat.*, 87), as affording the authority of the executor to sell in this instance.

The provision is as follows: "If any executor, &c., shall discover that the debts against any deceased person and the

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legacies bequeathed by him cannot be paid and satisfied without a sale of the personal property of the deceased, the same, so far as may be necessary for the payment of such debts and legacies, shall be sold." This provision confers no authority upon the executor to sell, neither does it restrain him in the general right to sell any portion of the personal property. The authority of the executor to sell is now as full and perfect as it was before that statute was passed. It is his duty to sell in the cases mentioned in the statute; but it was not designed to restrain him in his right or power to sell in any case. Neither can that section be construed as recognizing the right to sell the debt due to the testator as "personal property" required to pay his debts. Although "personal property," as used in another chapter of the Revised Statutes, would include choses in action; as used in this section and chapter, "personal property" means personal property at common law.

The authority of an executor to compound and release a debt has never been questioned. It has been contended, however, that on a trial at law on a *devastavit*, he would be held accountable in all cases for the amount of the debt released, regardless of the amount received. The rule was always otherwise in equity. It is useless to inquire whether the rule at law, as contended for, ever existed, as this court in this matter proceeds on the principles of equity, which are the principles of the law itself, as now modified by the Revised Statutes. Even if the rule existed now at law, it is a mere relic; for a court of law can in no case issue an execution except on an order of the Surrogate's Court on an adjustment of accounts in the latter court.

An executor is not only bound to compound and release a debt, when the interests of the estate require it, but he would be guilty of culpable neglect if he should fail to do so and lose the debt. He is bound to act in such case as a discreet and prudent man would act, were the debt his own. (*Murray v. Blatchford*, 1 Wend., 583; 3 P. Wms., 381.)

The mode in which the composition was effected cannot

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change the result. The assignment of the debt to a friend of the debtor was preferred to a release of it, and the estate lost nothing by the assignment, more than it would have done by the release. I do not mean to intimate an opinion that an executor who assigns a chose in action belonging to his estate for a sum less than is due from the debtor, is held to account for a sum greater than he received. If the estate lost nothing by the transaction, it is inequitable that he should account for more than he has received. The legal right and authority of the executor, as the successor and personal representative of the deceased, to sell, is unquestionable, to the extent that the law would allow the testator to sell; and such sale having been made in good faith, prudently and discreetly, with reference to the condition and interests of the estate, I see no reason why he should in equity be held liable for more than he has received, in thus doing an act tending to promote the best interests of the estate intrusted to his care and management.

As regards the debt of the executor against the estate, which is for medical service and attendance, it is satisfactorily proved that he was the family physician of the testator; that he, as such, attended him for several years, for which he had not received any pay. These services being valuable, the law presumes a promise to pay. It is competent, however, for the opposing party to show that the services were rendered gratuitously. Some expressions of the executor of an equivocal character have been testified to, showing that he did not intend or did not expect to receive payment for his professional services. These expressions are met with the proof of the declaration of the testator, regretting his inability to pay. It is manifestly just that the executor should have compensation for his services as a physician. There is some uncertainty as to the amount, but all the circumstances of the case authorize me to subtract something from the account thus rendered by him. I do therefore award him \$150. Costs not to be awarded to either party.

IN RE WELSH.

NEW YORK COUNTY—HON. ANTHONY L. ROBERTSON, SURROGATE—
December, 1849.

*In re WELSH.**

*In the Matter of proving the Last Will and Testament of
MARY WELSH, deceased.*

Undue influence in procuring a will may not only be proved by direct evidence of importunity, or the practice of arts upon the decedent, but may be presumed from facts;—which throws upon the party propounding it for probate, the burden of establishing free agency and understanding of the contents of the instrument.

Proof of prior instructions corresponding with the contents of a will, or complete recognition of every part of it as the free act of the decedent, is indispensable in every case of diminished mental power, accompanied by suspicious circumstances as to the origination and execution of the instrument. Mere acknowledgment of the will is not sufficient; it must appear to be the result of the decedent's own suggestions, freed from any influence.

The rector of a church which is residuary legatee in a will, who has the nomination to two scholarships created by it in a theological seminary, who procured the will to be drawn, was named therein as sole executor thereof, and superintended its execution, is a person so benefited by it as to require an investigation as to its *spontaneous* character.

Such an interest, under the common law, only makes a legacy presumptively void, although under the civil law it was absolutely void.

The relation of spiritual adviser, where the person holding it procures a will to be drawn, and superintends its execution, by which a church in which he is interested is benefited, raises enough of a presumption of undue influence to require proof of spontaneity or volition to repel it.

Part of a will may be refused probate in consequence of undue influence in regard to it, and the residue admitted. The same rule prevails as in case of incompetency or fraud as to such part.

This was an application on the part of Richard Cox, sole executor of the last will and testament of Mrs. Mary Welsh, that the will be admitted to probate. The will was con-

* This case is also reported in 7 *N. Y. Leg. Obs.*, 153. The case is here reported with the numerous typographical errors of that report kindly corrected by Chief-justice Robertson, now of the N. Y. Superior Court Bench.

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tested by several of the next of kin, as being the result of undue influence exercised by parties benefited, and they claimed that the probate should be refused.

The will bequeathed various legacies, in sums from three hundred to one thousand dollars, to different claimants on the bounty of the testatrix, to the extent of upwards of one-fourth of her estate; it then gave to the Episcopal Theological Seminary five thousand dollars to educate two indigent persons for ministers in that church, called founding two scholarships, one to be called the "Mary Welsh," the other "The Zion Church" scholarship; the nomination to them to be vested in the rector for the time being of "Zion Church," in the city of New York. It then bequeathed one thousand dollars to missionary purposes, and finally constituted said Zion Church residuary legatee with remainder over, in case of dissolution, to the same theological seminary; it also constituted Mr. Cox, the rector of that church, sole executor, with power of sale of the real estate. The will was drawn by Mr. Barker, a vestryman of Zion Church, who before had not known Mrs. Welsh, at the request of Mr. Cox, who went with him, and was present at the execution.

W. SILLIMAN, *for proponent.*

A. BLANCHARD, *for next of kin, contestants.*

THE SUREGATE.—Undue influence may be proved by direct evidence of importunity, or the practice of arts upon the decedent by the supposed agent; or may be presumed from the proof of facts which throws upon the party seeking to establish the will in question, the burden of proving it to have been the result of free agency and complete understanding of the contents; and this case is put by the contestants on both grounds. But of the former species of evidence, there is little trace in this case, except mere conjecture as to the objects of visits by the party implicated, to the decedent, not sufficient to merit much consideration; and I shall, therefore, proceed immediately to consider the presumptive evidence which requires countervailing proof to overthrow it.

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The first point to be looked at in this connection is, the position and character of the decedent. She was a widow upwards of eighty-five years of age, possessed of an estate of upwards of twenty thousand dollars, consisting of about twelve thousand dollars of real estate, and the residue of personal, which seems to have been derived from her deceased husband. She had no descendants, nor was there any one who seems particularly to have been intended or selected by her as the object of her posthumous bounty; she lived alone with a very aged companion, and was dependent upon several persons, strangers to her blood, for occasional services in her household, and small matters of business; her own relations, with two exceptions, resided at some distance from her, and visited her occasionally. Some of her husband's relatives resided more near her and visited her more frequently. The decedent died of a pulmonary disease about eleven o'clock of the evening of the day the will was executed, which took place about two o'clock in the afternoon. The natural character of the decedent, or as it developed itself towards the end of her life, is to be gathered from the testimony of all the witnesses.

The testimony of Mrs. Sawyer, Mrs. Knapp, and Dr. Underhill, shows her to have been set in her ways, not easily persuaded, opposed to making a will, and resisting medical directions. The admissions of Mr. Cox show her to have been a woman of considerable mind and a good deal of independence, impatient of advice, leading to mismanagement of her affairs by accumulating idle hoards in banks, amounting at her death to \$2700, while she had \$1600 loose cash in her house.

This kind of self-reliance is rather opinionativeness than independence, and is not inconsistent with a liability to be governed, if properly approached. Still, it requires some evidence to show that the energy which gave character to this obstinacy had failed, and that nothing remained but the unreasoning caprice; or, that arts had been practised which turned her strength to her destruction. For this purpose, the

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condition of the party must be examined, at the time of the *factum*.

The disease affecting the decedent at the time of her death was lingering and exhausting, so much so as to prevent rest, except in a sitting posture in a chair. Though not likely directly to affect the mind, it still must have greatly impaired its energies at so advanced an age, so shortly before her decease.

This effect was visibly and rapidly approaching towards the close of her life, according to the testimony of Mrs. Sawyer, young Mr. Shepherd, and Drs. Underhill and Hyslop, particularly as regarded her physical strength; her faculty of memory was evidently much damaged, particularly as regarded claims on her bounty and affection; her forgetfulness of Miss Shepherd, Miss Test, and Mr. Heins, shows this.

At the very time of executing the will, her infirmity and failing strength must have been apparent, for though she expressed no inability, and was not asked if she could write, Mr. Barker, the draughtsman and subscribing witness to the will, suggested that she should make her mark instead of writing her name, which could only have originated from some appearance of great weakness.

The character of her signature confirms this; and the only circumstance relied on by Mrs. Gattey, as proof of her strength, her never lying in bed, is shown to be a necessity arising from her disease. There existed in her case perhaps neither delirium nor *absolute* torpor: she was able to answer ordinary questions or salute an acquaintance; but this does not establish competency for every act. But, as observed by Sir JOHN NICHOL, "it is a great but not uncommon error that if a person can understand a question put to him, and can give a rational answer, he is of perfectly sound mind, and is capable of making a will for any purpose whatever; whereas the true rule of law—and it is a rule of common sense—is, the competency of the mind must be judged of by the nature of the act to be done, and from a consideration of all the circumstances of the case." (*Marsh v. Tyrell*, 2 *Hagg. Ec.*

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R., 122.) In regard to the testimony of Mr. Barker, it appears he had no previous knowledge of the testatrix; and all the means he used to test her soundness are before the court, from which it can make its own deductions. This I shall lay aside at present, to examine hereafter, in connection with another important question, the spontaneous character of this instrument. The result of all this testimony, taken together, I regard not as establishing absolute intestability, but only that species of diminution of mental power which, accompanied with any suspicious circumstances as to the origination or execution of the instrument, calls for proof of prior instructions, or complete recognition of every part of the will as being the free act of the decedent. In making such inference, I feel fully justified by the language of various cases. In *Bridges v. King* (1 Hagg. Ec. R., 265), Sir JOHN NICHOL says: "At this advanced age; after this long illness; having been confined to her bed two months; being in extreme bodily debility, ending in gradual dissolution; the deceased must so shortly before her death have been laboring under considerable infirmity." In *Montefiori v. Montefiori* (2 Add. R., 366), the same judge says: "The deceased was several months in a declining state, worse on the night of the instructions, and five hours before her dissolution this transaction begins. I think it highly probable *a priori*, on the face of this statement, that her capacity was impaired." And the same principle is further elaborated in the case of *Billinghurst v. Vickers* (1 Phil. R., 193).

This being established, it next becomes necessary to examine her intellection and the origin of the instrument. In regard to the first point, had the case turned upon the question of such proof of the understanding of this instrument as the law requires in case of impaired capacity, I should have hesitated in coming to a conclusion, because something said by her appeared to show a knowledge of part of the contents of the instrument, inasmuch as she suggested giving a legacy to a person omitted; but this, after all, is rather a perception of what was omitted, an instinctive consciousness, than a per-

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fect understanding of its contents. With this exception, the case comes fully within the principle laid down in *Croft v. Day* (1 *Curt.*, 789), that something must be said or done, showing the proper understanding. The doctrine laid down in that case is corroborated by the cases of *Ingam v. Wyatt* (1 *Hagg. Ec. R.*, 469); *Wyatt v. Ingram* (3 *Id.*, 466); *King v. Farley* (1 *Id.*, 502); *Williams v. Goude* (*Id.*, 595); *Durnell v. Corfield* (1 *Rob. Ec. R.*, 62); and *Harwood v. Baker* (3 *Moore P. C.*, 290).

* * * * *

I think it cannot be denied that Mr. Cox is placed in the attitude of a party benefited, or who may derive a benefit from the will, so as to require investigation as to its spontaneous character and the means taken by the counsel employed to ascertain it. The degree of that interest is immaterial, except perhaps as to the weight of evidence required to prove volition.

In the case of *Tomkins v. Tomkins* (1 *Bail. S. C.*, 96), a mere interest as guardian of certain children was considered sufficient to evoke the application of the principle which I shall apply in this case—that the court is bound to be vigilant in ascertaining that the decedent was acting on her own impulses, where capacity is impaired, and the party directing the preparation and execution of the will is benefited. This is not a modern doctrine, or one unsupported by experience. Swinburne says quaintly (1 *Swin.*, 189), “Worthily and with great equity and reason is that to be deemed for no testament when the sick person answereth ‘yea,’ the interrogation being made by a suspected person.” And he puts it both on the ground of suspected deceit as to the legatee, and want of testamentary intention in the decedent. Under the civil law, a preparation by an interested party rendered a legacy to him void. (*Dig. Lit.*, 34, tit. 8.) Under the modification of that law adopted by English ecclesiastical courts, such preparation only throws the burden of proof of voluntary origination with the testator on the person propounding the instrument for probate. It is true that at common law, where a deed

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or contract is executed by a party not of unsound mind, he is presumed to understand its contents, and not to be acting under any undue influence; but in courts having exclusive control of the probate of wills of personal property, it is otherwise: mere impaired capacity throws upon the party seeking to benefit by an instrument made under it, the burden of establishing understanding and volition, particularly when prepared by an interested party,—a principle recognized by common-law courts, at least where wills of personal property are in dispute. (*Clark v. Fisher*, 1 *Paige*, 176.) An unbroken series of cases in the English ecclesiastical courts, overhauled on appeal by the common-law judges, establish the doctrine incontrovertibly. Sir JOHN NICHOL, in one case,—*Marsh v. Tyrrell* (2 *Hagg. Ec. R.*, 87),—says, the party originating and conducting the transaction being present at all material parts of it, “the case proceeds to the evidence of the *factum* under presumptions of fraud and imposition.” In another, *Billinghurst v. Vickers* (1 *Phil. R.*, 193), “The presumption is strong against an act done by the agency of the party benefited.” In a third, *Peak v. Ollatt* (2 *Phil. R.*, 323), “Where the person who prepares an instrument and conducts its execution is himself an interested person, his conduct must be watched. Presumption and *onus probandi* are against the instrument.” The same doctrine is reiterated in *Ingam v. Wyatt* (1 *Hagg. Ec. R.*, 390); *Durnell v. Corfield* (1 *Rob. Ec. R.*, 62); and stated in the elementary work of Swinburne (1 *Swin.*, 191), and adopted in the case at common law of *Tomkins v. Tomkins* (1 *Bail.*, 96). Whatever may be the theory on which it is founded,—whether the supposition that the benefited party is presumed to have contrived the whole transaction, or the more extensive principle to which I shall presently advert, of being employed in the confidential capacity of procuring the will to be drawn, and therefore to be watched,—I consider it too well settled by decisions, and consistent with the common experience of mankind, to disturb or doubt it.

The additional ground to which I have alluded, why the

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case requires conclusive proof of volition and intelligence on the part of the decedent, is the confidential relation subsisting between the party benefited and the testatrix. . Mrs. Welsh appears to have been an attendant on Zion Church, of which Mr. Cox was pastor, and favorably disposed towards him, though opposed to the other officers of the church.

Mr. Cox, whose residence was nearly opposite hers, visited her for several years before her death frequently, and latterly almost daily, and it is but fair to presume that his visits, considering her state and his profession, were pastoral. The confidence arising from this must have been very great, so much so that even daily visits were not considered sufficient, and she complained that he did not come more frequently. The comfort therefore of his presence, and the reliance upon his advice, must have been very great; for such is the weakness of human nature, that we come to believe that from the lips whence flows religious instruction, nothing can come less pure. While on the other hand, a religious guide, urged on by the zeal of his profession, and dazzled by the glory of the object, may sometimes be blinded to the means used to obtain it.

Statutes of *mortmain* are left as evidence of the danger arising from the abuse of a confidential relation, and the precautionary means adopted against it, in the case of ecclesiastics. Different municipal laws in all countries have prescribed the cases in which parties standing in a confidential relation to another can take no benefit from them by a gift, particularly executory or prospective gifts; which rule there has been a constant tendency to extend. Thus the law of France, which in terms only mentions "tutors," was by construction extended to schoolmasters, directors of the conscience, and attendant physicians (*Pothier, Don. entre Vifs*, § 1); and that too where the party was alive. The law of England establishes the general principle only as one of presumptive evidence, and leaves the party claiming to be prepared with evidence, in such case, to rebut it. In *Griffin v. Robbins* (3 *Madd. R.*, 19), the dependence arose from the in-

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firmity of the donor and reliance upon the kindness of the interested party. In *Huguenin v. Baseley* (14 Ves., 287), the confidence arose from the party being a spiritual adviser. In *Vaughan v. Lloyd* (5 Ves., 48), the party was an agent. In *Dent v. Bennet* (7 Swin. R., 546), the party was a physician. But the vice-chancellor gave the instance of a clergyman as an extreme case in which he should apply the principle. In *Gibson v. Jeyes* (6 Ves., 278), Lord ELDON stated it to be "the great rule in equity, that he who bargains with a person placing confidence in him, is bound to show that a reasonable use has been made of that confidence,—a rule applying to trustees, attorneys, or any one else." If this be so in regard to a contract where the party imposed on has the fear of loss of what he parts with as a spur to his vigilance, how much more should it be so in regard to posthumous bounty, where the testator only directs how that shall go of which death shall certainly deprive him! The same principle is echoed in *Barrow v. Rhinelanders* (1 Johns. Ch., 556), where the simple relation of employer and clerk was considered sufficient for its application, and was applied with great effect in *Whelan v. Whelan* (3 Cow., 572, 583). Nay, so far has the doctrine been carried, that even after the state of dependence has ceased, if it has ever existed, the same scrutiny is exercised. Thus in *Osmond v. Fitzroy* (1 P. Wms., 130), the party claiming had been the confidential domestic of a minor, and obtained, after he was of age, a security. In *Griffin v. Devenille* (in Cox's note to 1 P. Wms., 131), a minor had lived with a sister for a long while before coming of age, and had afterwards executed a security to her husband. In *Wright v. Proud* (18 Ves., Jr., 137), a lunatic, after restoration to reason, executed a security to a keeper of an asylum for lunatics; yet the rule was applied though the relation had ceased. Whenever influence may be presumed, it is to prevail (*Evans v. Llewellyn*, 1 Cow, 384; also 4 *Mylne & Cr.*, 269); and that, too, regardless of the personal character of the party benefited (*Tomkins v. Tomkins*, 1 Bail., 96). This being a general rule of law, it surely is not too harsh to ap-

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ply the language of the eminent judge who pronounced the decision in the case of *Harwood v. Baker* (3 *Moore P. C.*, 290) to this case: "Protection is most needed where the mind is too enfeebled to take in more objects than one; and most especially when that one object may be so forced upon the attention as to exclude all others that might require consideration." A rule so inflexible cannot yield even to the claims of a supposed scheme for advancing religion, particularly when tinged with sectarianism.

The burden being thus thrown on this executor of proving affirmatively good faith and a proper use of the confidence placed in him, it becomes necessary to examine the facts tending to show it.

[The learned surrogate having arrived at the conclusions—1st, that the faculties of the decedent were so deteriorated as to let in proof of the mode of preparing the will and presenting it to the mind of the testatrix; and 2d, that its preparation under the direction of a party benefited by it, standing in a confidential relation, raises the presumption of undue influence—proceeds to discuss the testimony and the means employed to discover spontaneity. As his conclusion—that the means which were employed in this case were not calculated to rebut the presumption, and therefore the portions of the will from which the interested party derived his benefit must be rejected—was not concurred in by the general term of the Supreme Court, to which an appeal was taken, though otherwise affirmed, the rehearsal and discussion of the testimony on this point are omitted. The decree of the Supreme Court may be found in the N. Y. Surrogate's office, in *Liber of Wills*, 107, at pages 1-30.]

It only remains to inquire if the whole will must stand or fall. If the question were *res integra*, both on the score of justice and policy, the power of sustaining part and rejecting part should be upheld;—of justice, because it would be hard that those who were voluntary and natural objects of bounty should suffer by the acts of another; of policy, because the fraudulent contriver might throw into the instrument proba-

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ble gifts to color the transaction on one hand, and seal the mouths of witnesses on the other; but the law has been settled on this point long since. (*Shelf. on Lun.*, 333; 2 *Law Lib.*, 212.) Codicils, which are as much part of wills as if incorporated therein, and draw the will down to their date, as if then republished, are frequently rejected (*Grosbie v. MacDoual*, 4 *Ves.*, 610; *Sherer v. Bishop*, 4 *Bro. C. C.*, 55; *Brounker v. Brounker*, 7 *Phil.*, 57), leaving the will to stand. In fact, courts of probate exercise complete control over the will, in case of fraudulent insertion in the testator's lifetime, or incapacity during the execution of part (*Billinghurst v. Vickers*, 1 *Phil.*, 187; *Wood v. Wood*, *Id.*, 357; *Trimlestown v. D'Alton*, 1 *Dow. N. S.*, 85); and there is no possible reason for not exercising the same power where part of the will may be supposed to be the result of undue influence. If the jurisdiction is conceded, the reason for exercising it in one case is as strong as in the other. I shall therefore admit to probate that part of the will which is free from imputation, being all except the residuary legacy and the appointment of Mr. Cox as executor. I had some little doubts as to the first legacy to found the scholarship, but the benefit is so little of a personal character, that I think it may be allowed to stand, particularly as, according to the testimony of Mrs. Knapp, the decedent showed a favorable inclination towards such institutions. The management of the funds is vested in a body in which Mr. Cox has no more interest than any other person, and the mere power of selecting the individual to be educated is too remote to come under the rule I have laid down.

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JEFFERSON COUNTY—HON. MILTON H. MERWIN, SURROGATE—February, 1863.

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*In the Matter of proving the Last Will and Testament of
JOHN CLARKE, deceased.*

Where no failure of memory was exhibited at the time the will was executed, and the testator is not shown to have had any disease of the brain which permanently impaired his mental faculties,—*Held*, that the facts of his old age, declining health, and his failure to recollect or understand certain transactions, do not prove a want of mental capacity to make a will.

A statement made by the testator after the execution of a codicil, to a daughter whom he had therein disinherited, that he had given her the sum of \$600, and no such sum appeared in the will,—*Held*, not sufficient to prove a want of capacity. The capacity of a testator to make a will must be determined by what happened at its execution, and not what afterwards occurred.

The influence to vitiate an act must amount to force and coercion, destroying free agency. It must not be the influence of affection and attachment, nor the desire of gratifying the wishes of another. The proof must be, that the act was obtained by coercion; by importunity that could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear. The natural influence of a wife, arising from her relations with the testator, without proof of any specific acts, will not amount to such coercion.

J. F. STARBUCK, *for Proponent.*

J. CLARKE, *for Contestant.*

THE SURROGATE.—John Clarke, of Ellinburgh, aged about 71 years, died on September 11, 1862, leaving a will and codicil, which are now presented for probate. The will was made August 9, 1861, and, among other things, gave to Mrs. Brooks and Mary Davis, children of his daughter, Caroline Davis, \$245 each; and to his daughter, Caroline Davis, an equal share with the rest of his children. The codicil was

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made July 23, 1862, and revoked the legacies made by the will to Caroline Davis and her daughter Mary.

The codicil is contested by Mrs. Davis, on the ground of the incapacity of the testator, and undue influence.

The deceased was an old man, in declining health, though not confined to his house, having considerable property, and ordinarily very close in his bargains and dealings generally. As far as the evidence shows, his mental capacity was as good at the time he made the codicil as it was the year before, when he made the will, although it is probable that physically he was not as well. Upon the occasion of the execution of the codicil, there was no particular exhibition of mental weakness. He had previously spoken to Hopkinson a number of times to draw it, and appears to have urged the matter. On the day the codicil was executed, he went to Hopkinson's store, told him what he wanted done and how he wanted his will changed. The same witnesses were called as were to the will, upon the suggestion of the deceased that it would be less expensive. One of the subscribing witnesses was the family physician, and the other a merchant, the partner of Hopkinson, both men of intelligence, and had been acquainted with deceased a number of years. They both think the deceased was capable then of making a will—no failure of memory was then exhibited. He had no disease of the brain that permanently disabled or impaired his mental faculties. He is shown to have been capable of understanding ordinary business transactions, and especially any thing that affected his own pecuniary matters. Instances are given of his failure to recollect some things and understand some transactions, but nothing that shows him permanently in that state. If the evidence of the two subscribing witnesses and of Hopkinson is to be believed, and I see no reason why it should not be, the deceased had sufficient mental capacity to make the codicil, unless the character of the provisions of the codicil is such as to overcome that evidence.

By the codicil, the deceased disinherited one of his daughters and revoked a legacy he had given to a grand-daughter.

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For doing as he did to the grand-daughter, he at the time gave a rational reason, if true. I have no doubt he supposed it true, although afterwards he was informed and believed it was not so. For disinheriting his daughter, he gave as a reason that he had determined her husband should not have control of any of his property; that he had nothing against his daughter, but that if she got the money she would give it up to him if he wanted it. Another circumstance is sworn to by the daughter, which should be mentioned here; and that is, that the deceased, about a week after the codicil was made, told her that he had willed her \$600, and specified what he wanted her to do with it.

Now the fact of disinheritance, as repulsive as it may be, is not of itself sufficient to prove the deceased incompetent. That would not be a safe rule to establish. A man in his sane mind has a right to do with his property as he chooses. The motives that impel him, in most cases, we cannot determine. He is himself the judge of what is right. The act may seem to us unnatural, when, if we knew his inmost feelings, it would seem otherwise. The act may be, in fact, wrong; still, if not against good morals or public policy, we have no right to say any thing against it. The only question is, Was it the voluntary act of a competent mind? (See *Van Pelt v. Van Pelt*, 30 Barb., 134.)

As to the statement made by the deceased to Mrs. Davis after the codicil was made, if true, it may be more difficult to explain. He said he had given her \$600. That amount was not mentioned in the will. It may be that her interest in the will would have amounted to that. It may be he had in his mind another will that he intended to make, or that Mrs. Davis was mistaken in the date. If she was right in the date, it would follow that deceased either meant to deceive her, or had forgotten about the codicil. Suppose the latter state to be the fact, would it show him incompetent to make the codicil? I think the capacity of the deceased to make it must be determined by what happened then—not what afterwards occurred.

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Under this state of circumstances, I think I must hold that deceased had sufficient capacity to make a will, and that if the codicil is his voluntary act, it must stand. Chancellor KENT, in *Van Alst v. Hunter* (5 Johns. Ch., 158), lays down what is now probably considered the correct rule, that "the law looks only to the competency of the understanding, and neither age or sickness, or extreme distress, or debility of body will affect the capacity to make a will, if sufficient intelligence remains." (See, also, 26 Wend., 231; 7 Paige, 236; 21 Wend., 142; 3 Den., 37; 8 Mass., 370; 9 Pick., 212; 1 Bradf., 360; 17 Barb., 236.)

Was the codicil the voluntary act of the deceased? Was it his own act, or the act of another? Was any undue influence brought to bear upon him, from any source, to accomplish that result?

The influence, to vitiate an act must amount to force and coercion, destroying free agency. It must not be the influence of affection and attachment. It must not be the desire of gratifying the wishes of another, for that would be very strong ground in support of a testamentary act. Further, there must be proof that the act was obtained by this coercion, by importunity that could not be resisted, that it was done merely for the sake of peace, so that the motive was tantamount to force and fear. (1 *Jarman on Wills*, 40; *Gardner v. Lardner*, 22 Wend., 526.) If a dominion was acquired by any person over a mind of sufficient sanity for general purposes, and of sufficient soundness and discretion to regulate his affairs in general; yet, if such a dominion or influence were acquired over him as to prevent the exercise of such discretion, it would be equally inconsistent with the idea of a disposing mind. (EYRE, C. B., in *Mountain v. Bennet*; 1 Cox, 355, cited in 4 *Williams on Ex.*, 44, ed. of 1859; *Stultz v. Schaeffle*, 18 Eng. Law & Eq., 576.)

At the time the codicil was executed, nothing happened to show it was not the voluntary act of the deceased. Neither is there any evidence that the ideas of the codicil were suggested to him by anybody else. It is claimed, however, that

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undue influence was exercised over the deceased by his wife, and that she had a motive for such acts, in her hostility to Mr. and Mrs. Davis. It appears there was some ill feeling between Mrs. Clarke and Mr. Davis, arising from their different religious belief, though I think the evidence does not show that this ill feeling extended to Mrs. Davis. True, Mrs. Davis swears that Mrs. Clarke, in 1860, told her she would prevent her getting any of her father's property, but Mrs. Clarke denies it. The will of 1861 was afterwards made, giving Mrs. Clarke her share. No other expression to that effect, from Mrs. Clarke, is shown; and since then, they appear to have been on good terms.

Mrs. Davis testifies that, in the winter of 1861-2, Mrs. Clarke spoke against Mr. Davis, complaining that he had spoken against her belief, and that she would be enough for him; that if she could not in one way, she would in another. No reference was made to property matters. By the making of the codicil, Mrs. Clarke was in no way pecuniarily affected. So that, pecuniarily, or as against Mrs. Davis, there was no motive for Mrs. Clarke to change the will.

As to the influence Mrs. Clarke had over her husband, there is not much evidence. Mrs. Davis says, that in 1860 there was some dispute between Mrs. Clarke and her husband about the arrangement of her property matters after his death; that she wanted certain things for her life, and not under the control of Hopkinson, and Mr. Clarke did not want it so; and that Mrs. Clarke afterwards told her she had got the matter arranged according to her wishes. It is not easy to see the importance of this, or the probability of its occurrence, when it also appears that Mrs. Clarke gets comparatively nothing under the will, but that she gets her rights, almost entirely, under an ante-nuptial agreement, made in 1854, and that whatever she does get under the will, Hopkinson has the control of.

Mrs. Clarke was much younger than her husband, and healthy, and very likely she had a good deal of influence over him,—though her declarations to that effect I do not consider

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of much importance, unaccompanied by acts. He was old and feeble, and liable to outside influence; but the case fails to show the exercise of any influence over him to the detriment of Mrs. Davis, or to influence him to make the codicil, and no motive for such influence as to Mrs. Davis or her daughter Mary. From the simple fact that she disliked Davis, I cannot reasonably infer that she wanted Mrs. Davis disinherited, or her daughter deprived of her legacy; especially as Mrs. Clarke swears she advised the deceased to do directly the contrary.

I cannot, therefore, find that the codicil was made by reason of any undue influence exercised by Mrs. Clarke. Upon the whole case, I find the codicil to be the voluntary act of the deceased. He undoubtedly considered Davis a litigious man. Mrs. Davis was not in need of his money, and he therefore concluded to do as he did. The legacy to Mary Davis was revoked under a mistake of fact, with grounds, however, of belief. It is the misfortune of the legatee that the deceased, when he found out his error, did not rectify it; I cannot rectify it for him.

The will and codicil are admitted to probate.

NEW YORK COUNTY—HON. CHARLES MCVAN, SURROGATE—1847.

*In re WARD.**

In the Matter of the application for Letters cum testamento annexo de bonis non of the estate of JACOB WARD, deceased.

Where letters of administration with the will annexed are granted, in a case where letters testamentary have never been issued, and there is no executor to take, or where the administrator with the will annexed dies, they issue to persons in the following order of preference: 1. Residuary legatees; 2. Principal or specific legatees; 3. The widow; 4. Next of kin;

* Reported in 6 *N. Y. Leg. Obs.*, 111.

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5. The public administrator (in the city of New York); 6. Creditors; 7. Any person not interested, who will accept.
In other counties than New York, the county treasurer takes next after creditors.

THE SURROGATE.—What is the order of preference in the granting of letters of administration with the will annexed, on goods left unadministered by a former administrator with the will annexed, who has died?

The doubt which is thrown over this question, arises from the obscurity of the provision of the statute which prescribes the order of priority. The section is as follows:

"§ 45. If all such executors or administrators shall die, or become incapable, as aforesaid; or the power and authority of all of them shall be revoked, according to law; the surrogate having authority to grant letters originally, shall issue letters of administration upon the goods, chattels, credits, and effects of the deceased, left unadministered, with the will annexed, *or otherwise, as the case may be*, to the widow or next of kin, or creditors of the deceased, *or others*, in the same manner as hereinbefore directed in relation to original letters of administration, &c." (2 Rev. Stat., 78.)

The true construction of this statute, which is rendered ambiguous by a desire to economize in the use of words, is this: If an executor or original administrator with the will annexed, shall die, &c., letters with the will annexed *de bonis non* shall be granted to persons in the same order of preference as is prescribed in the law of original administration with the will annexed; and, if an original administrator, in case of intestacy, shall die, &c., letters *de bonis non* shall be granted to persons in the same order of preference, as is prescribed in the case of granting letters originally on the estates of intestates.

The 14th section (2 Rev. Stat., 71) shows the persons entitled to original letters of administration with the will annexed, and the order of preference. The 27th section (2 Rev. Stat., 75) shows what persons are entitled to original letters of administration, and the order in which they are preferred. The

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45th section (2 *Rev. Stat.*, 78), which I have quoted in part, and which prescribes the order of preference in case of administration with the will annexed *de bonis non*, refers to the said 14th section for the rule, and that 14th section refers to the said 27th section for a rule in part. In ascertaining the rule, therefore, for granting letters of administration with the will annexed *de bonis non*, the three sections, taken together, prescribe the rule, and it is as follows, that is to say: 1. The residuary legatees; 2. The principal, or specific legatees; 3. The widow; 4. The next of kin; 5. The public administrator (in the city of New York); 6. Creditors; 7. A stranger to the estate, who will accept the office. In other counties of this State, the county treasurer takes next after creditors. The same order of preference, of the same classes of persons, obtains in the case of the original administration with the will annexed, where letters testamentary have never issued, and there is no executor to take, or who will take.

The practice that has prevailed, and perhaps does yet in some courts, of appointing a person not interested in the estate, at the suggestion or by the agreement of those who occupy the first classes, in the order of priority of right, without consulting the others lower in the scale, was and is a palpable violation of the law. The convenience of estates and parties is often so strongly urged, and is so apparent, as to afford strong temptation to transgress the rule; and the argument is urged that there can be no harm in breaking the law, as long as the interest of those principally concerned in the estate are promoted. The most unjustifiable of all breaches of the law, is that by him who is appointed to see that it is in all things observed. The evil effect of such a departure from all correct moral principle in administering law, may not be much felt in the particular case; but its effect in begetting a disrespect of the law itself, thus wounded in the house of its friend, is incalculable. To a judge, to whom the law is not the supreme law of his conduct in all matters committed to his care, no rule can be prescribed that can bind him.

IN RE ROOT.

NEW YORK COUNTY—HON. CHARLES McVEAN SURROGATE—December, 1847.

*In re Root.**

In the Matter of application for Letters of Administration on the estate of JOEL ROOT, deceased.

The order of right to administration in the city of New York is, first, the widow; second, the next of kin; third, the public administrator; fourth, creditors; fifth, any other person who will accept the same. In other counties, the treasurer, as public administrator, comes in next after creditors.

One having priority of right to the administration, can only deprive those coming after him of their right by taking letters himself. He cannot nominate a third party to the exclusion of the others.

O. BUSHNELL, *for Applicant.*

E. H. KIMBALL, *for Next of Kin.*

THE SURROGATE.—The general statute conferring jurisdiction upon the Court of the Surrogate to appoint administrators in cases of intestacy, prescribes the order of priority of right to such appointment. (2 *Rev. Stat.*, 74, § 27.) In that order the widow stands first; and her right being primary, is exclusive, without a coequal. The second in the order of priority of right are the next of kin; and although the statute seemingly divides this class into six different orders in the right of priority, yet a clear examination of the statute shows that such was not the design of the statute. The words of the statute are these:

“Administration, in cases of intestacy, shall be granted to the relatives of the deceased *who would be entitled to succeed to his personal estate*, if they or any of them will accept the same, in the following order: First, to the widow; second,

* Reported in 5 *N. Y. Leg. Obs.*, 449.

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to the children ; third, to the father ; fourth, to the brothers ; fifth, to the sisters ; sixth, to the grandchildren ; seventh, to any other of the *next of kin who would be entitled to share in the distribution of the estate.*"

A father is in no case entitled to administration where the intestate has left children ; nor is a brother, &c. ; for in such case, although relatives, they have not the qualification of being entitled "to succeed to his personal estate," which is an indispensable qualification. The father or the brother is not the next of kin where the intestate has left children ; he is of kin, but *next*, of kin is technical ; and the test is the being entitled to succeed to the personal estate of the intestate. The statute of distribution determines the question who are *next* of kin. It is no matter how near of kin a person may be ; if he is not *next*, he has no right to intermeddle with the estate. The section I have quoted, it will be observed, at its commencement limits the right of administration to such relatives as would be entitled to succeed to the personal estate, and closes with awarding administration "to any other of the next of kin who would be entitled to share in the distribution of the estate," which is the same thing in different phraseology. The next in order in the city of New York who is entitled to administration is the public administrator, who, by the same section, is to "have preference *after* the next of kin *over* creditors and all other persons." Next in order is the creditor ; and after him any competent person. The order of priority in the city of New York is as follows : First, the widow ; second, the next of kin ; third, the public administrator ; fourth, creditors ; fifth, any competent person that will accept. In other counties, the treasurer, as public administrator, comes in next after creditors. The main question in this case is this : Can a person or a class of persons, having a priority of right in the order of preference, appoint, or rather nominate, a person administrator not otherwise entitled to administration, to the exclusion of others below them in the order of preference ? Can a widow, passing over the children, &c., appoint a stranger, or can the children, passing

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over the public administrator and creditors, appoint a stranger to the estate?

The widow can renounce, and the law appoints her successor, and not she. So also the children may renounce, and the law appoints their successor. The right is personal merely to themselves, without the power of substitution. All that the law allows in this respect is, that the person in whom the right is may have an associate in the administration who is not interested in the estate. (2 *Rev. Stat.*, 76, § 34.) When a child applies, he must produce the renunciation of the widow. When a creditor applies, he must produce the renunciation of the widow and the children and the public administrator; and if such renunciation be not presented, all persons having prior rights must be cited, and a failure to appear on such citation is equivalent to renunciation. In this case, the next of kin must take or renounce—that is the extent of their right. The creditor cannot take, because he has not produced the renunciation of the public administrator, nor cited him. The right of the public administrator to take after the next of kin cannot be defeated by any arrangement that has been made, or can be made, between the persons interested. The next of kin can deprive him of the administration by taking letters themselves, and in no other way. His right next after them is perfect.

KINGS COUNTY—HON. JESSE C. SMITH, SURROGATE—December, 1859.

DAVIS v. BROWN.

In the Matter of the application for Letters of Administration on the goods, &c., of A. B., deceased.

Cohabitation and reputation are circumstances from which a marriage in fact may be inferred; but these circumstances do not of themselves constitute a marriage. They are evidence merely of a marriage contract, which may be rebutted by other testimony.

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Thus, where A. B., the deceased, and C. D. had cohabited together as man and wife, at a place of public resort, during two summers, and had taken a house in town under an assumed name, but they were not publicly recognized or known as man and wife among the family relatives and friends,—*Held*, that the presumption of marriage was rebutted by the confession of C. D., that she was not married to the deceased. Letters could not, therefore, be granted to her on the ground that she was the widow of the deceased, though on her application for letters she had sworn positively that she was such widow. .

The facts are fully stated in the opinion.

THE SURROGATE.—An application for letters of administration on the estate of the deceased was made in the usual form, the applicant having stated under oath that she was the widow of the deceased; that the deceased died intestate, without children, and that his next of kin are his mother, and several brothers and sisters, residing in the city of Brooklyn.

The applicant being unable to state the amount of property of which the deceased died possessed, subpoenaed the next of kin of the deceased before the surrogate, to give evidence of the amount of such property.

Upon the appearance of the parties before the surrogate, a brother of the deceased objected to the granting of letters of administration to the applicant, on the ground that she was not the widow of the deceased; and a sister of the deceased made oath that she was informed by her brother, on his death-bed, and believed it to be true, that the applicant was not his wife.

To prove the marriage of the applicant with the deceased, five witnesses were called, three of whom testified that the deceased and the applicant took a house in the city of Brooklyn under an assumed name of Mr. and Mrs. P., and that they resided together in that house as man and wife from May 1st, 1851, to May 1st, 1852. And the other two witnesses testified, that the deceased and the applicant, during the summers of 1850 and 1851 boarded at a private boarding-house at Lake Mahopac, in which several families boarded, and the parties were there known as Mr. and Mrs. A. B.,

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and there cohabited together and held themselves out as man and wife, and they were recognized as such by the boarders and inmates of the family.

In opposition to this, the Rev. Mr. O., an Episcopal clergyman (then of the city of Brooklyn), testified that the applicant called on him during the last illness of the deceased, and requested him to carry a message from her to the deceased, who was then at the house of his mother, in Brooklyn. Upon being asked, by Mr. O., why she did not go herself, she replied, that the family objected to her going there. And this witness further stated, that in the course of the conversation he then had with the applicant, she stated that she was not married to the deceased, but probably would have been before that time had it not been for his ill health; and on his cross-examination, he stated that he asked the applicant what relation she sustained to Mr. A. B., the deceased, and whether she was engaged to be married to him, and she said they had been engaged to be married; whether she said they were at that time or not, he did not recollect, but that they would have been married ere that time if he had not been in ill health. She did not say that they cohabited together as man and wife; but she said that the deceased had passed her off as his wife somewhere in the country.

A brother of the deceased was called as a witness, and testified that in the summer of 1851 he was at Lake Mahopac, and saw his brother, A. B. deceased, there, but did not know that he had any one staying with him; that his deceased brother never spoke to him of this woman, and he never heard that his brother was married, nor that he supported any person as his wife, until a short time previous to his death.

Upon this testimony, the question is submitted whether the applicant, who calls herself the widow of the deceased, is entitled to letters of administration.

There is no evidence in this case that any marriage ceremony took place between the parties, nor has any contract of present or future marriage been proved. But a marriage in

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fact is sought to be inferred from cohabitation and reputation as husband and wife.

The case of *Starr v. Peck* (1 *Hill*, 270) has been cited, and urged as sustaining the position claimed by the counsel for the applicant, that there is sufficient evidence in this case, aided by the presumption that the parties would not indulge in a connection which was immoral, to establish the contract of marriage between the deceased and the applicant.

I have carefully examined that case, and the other cases cited by the counsel for the applicant, together with the case of *Clayton v. Wardell* (4 *N. Y. [4 Const.]*, 230), decided by the Court of Appeals in 1850. The rules of law established by these cases, as I understand them, are, that marriage is a civil contract, and may be consummated without the aid of a clergyman or magistrate; that no particular form of words or ceremony is necessary, but there must be an actual present contract of marriage, or a contract to take effect at a future time, which must be consummated, before the parties can sustain the relation of husband and wife; that the contract may be inferred from the conduct of the parties by cohabitation, and by holding themselves out to the world as man and wife; and that the circumstances of the cohabitation and reputation should be submitted to the court or jury, as testimony from which a marriage in fact may be inferred; but that these circumstances do not of themselves constitute marriage, that they are evidence merely of a marriage contract, and are liable to be rebutted by other testimony. (*Clayton v. Wardell, supra.*)

Testing this case by these rules of law, I am of the opinion that the admission of the applicant to the Rev. Mr. O., that she and the deceased were to have been married, or would have been married, had the health of the deceased been good, together with the evidence that during the year the parties lived together in Brooklyn they did so under an assumed name, rebut the presumption of a contract of marriage arising from cohabitation and reputation. For it will be borne in mind that the testimony in this case upon that subject is limited to

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a summer jaunt or two at a place of resort somewhat removed from the residence of the parties and their friends, and to the hiring and enjoyment of a house for a year under an assumed name. If the evidence had been, that these parties had been introduced and recognized among the members of the family of the applicant, or of the deceased, as husband and wife, the admission made to the Rev. Mr. O. might be construed into a mere declaration that they were not married only because no marriage ceremony had been performed. But, under the circumstances of this case, I do not think a court would be warranted in putting any such construction upon that admission, nor in allowing the presumption in favor of the innocence of the connection of these parties to overcome the positive declaration of the applicant that no marriage had in fact taken place.

I must therefore decide against the application, and an order must be entered denying the right of the applicant to take out letters of administration on the goods, chattels, and credits of A. B., deceased.

NEW YORK COUNTY—HON. CHARLES MOVEAN, SURROGATE—September, 1846.

*In re JONES.**

In the Matter of the accounting of JONES et al., executors of JOHN MASON, deceased.

The account of proceedings required of an executor or administrator must be such an account as, when rendered, may be finally settled.

The account must state, as part of the executor's proceedings, when the inventory was filed, when the advertisements for claims were published, what claims were allowed, what disputed and what rejected by the executor, and the time and manner in which they were rejected or dis-

* Reported in 5 *N. Y. Leg. Obs.*, 124.

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puted; what suits, if any, have been commenced on such disputed or rejected claims; which of them have been determined, and how; and which are pending, and the amount claimed; also what claims have been presented and allowed since the expiration of the advertisement for claims. If no such claims have been rejected or disputed, and no suits commenced, it must be so stated. All these things are essential in the account. It is material also that the character of the debts paid or allowed or prosecuted, should be stated—that is, whether judgments docketed, &c., or debts of inferior class.

The executor must first charge himself with the amount of the inventory; then with "the increase" of the inventory for any cause, whether direct or indirect, whether it be the increase of the flock, from interest, from selling at a higher price than the appraised value, or it be the increase from any property not embraced in the inventory. If there is no increase, that fact must be stated. He may credit himself for articles lost or perished, stating the cause of the loss; with the decrease, and with debts due the estate not collected, stating the facts justifying the credit given; with the funeral charges and expenses of administration; with moneys paid to creditors, naming them; and then, with payments to legatees and next of kin. He must state the ages, condition in life of females, of legatees, and next of kin, and if any are minors, the fact must be stated, and whether they have guardians, and if so, their names, residences, and how appointed. He must also produce vouchers supporting each payment, or in case of claims under \$20, in lieu of vouchers, his own oath of payment.

The surrogate has not the jurisdiction to try or to establish a disputed debt. He can only determine the fact whether the debt be established or not.

The surrogate granted an order requiring the executor to tender an account of his proceedings. The sufficiency of the account as rendered was contested by the petitioner

A. L. ROBERTSON and MR. RING, *for the Applicant.*

M. S. BIDWELL and DANIEL LORD, *for the Executors.*

THE SURROGATE.—What does the order require? The statute renders the answer to this question plain. The order itself speaks for itself. Its mandate is that the executor do render an account of his proceedings as executor. Its comprehensiveness has its foundations in its simplicity. It reaches every part of his administration by the force of the terms used. An analysis of the statutes shows the design of the order to be as far reaching as its language imports. The

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52d section (2 *Rev. Stat.*, 1 ed., 92), confers jurisdiction upon the surrogate to require an account of proceedings of an executor by order, after the expiration of eighteen months from the time of his appointment. By the 59th section the executor may have "the same" account that he is required to render by the said 52d section, finally settled. It therefore follows that the account that is to be rendered in obedience to the order is, when rendered, such an account that it may be finally settled, for it is "the same" that may, in the option of the executor, be finally settled. If it be borne in mind, in considering the provisions of this statute, that the only account required by that statute is the one in its essence and form when rendered, such that it may be settled at the call of the applicant, or finally settled at the call of the executor, all difficulty will be avoided. There is but one account mentioned in the statute, and the provisions of the statute as to the examination of the executor apply to that account, no matter whether the examination take place when presented, or when settled, or when finally settled.

The *rendering* of this account is not completed on filing the account, but includes within it the entire process of settlement or final settlement, when required. The account must state, as part of the executor's proceedings, when the inventory was filed; when the advertisements for claims were published; what claims were allowed, what claims were disputed, and what claims were rejected by the executor, and the time and manner in which they were rejected or disputed; what suits, if any, have been commenced on such disputed or rejected claims, which of them have been determined, how determined, and which of them are pending, and the amount claimed. Also, what claims have been presented and allowed since the expiration of the publication of the advertisements for claims. If no such claims have been rejected or disputed, and no suits have been commenced, it must be so stated. All these things are essential in the account. The inventory is the basis of the accounting. How can the surrogate make the allowances for property

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lost and for decrease, as he is authorized to do by sections 56 and 57 of said article, except on reference to the inventory which the executor is required to file? And how can he determine whether debts paid to creditors were properly paid, as the surrogate is required by section 65, if he is not informed by the account of all the debts? If all be not paid, it may be improper to pay the whole of one debt. The payment of each depends upon the payment of all, or his having in his hands the means to pay all. How can the surrogate reserve from distribution a sum to satisfy pending suits, as he is required by section 74, if it be not stated in the account what suits are pending?

Not only are all these things material, but it is material also that the character of the debts paid, or allowed, or prosecuted, should be stated—that is, whether they are judgments docketed, &c., or debts of inferior class. How else can the surrogate determine whether they have been properly paid; or how can he, if unpaid, determine whether they are preferred debts under the statute? The executor must first charge himself with the amount of the inventory. Then he shall charge himself with “the increase” to the inventory for any cause, whether direct or indirect, whether it be the “increase” of the flock, “the increase” from interest, “the increase” from selling at a higher price than the appraised value in the inventory, “the increase” from any property not embraced in the inventory. And if there be no increase from any cause, that fact must be stated. The authority for requiring this is section 57, which says an executor shall make no profit, but expressly provides that he shall account for the increase. The section 65 also shows that these matters must be embraced in the accounts. The sum total of these are the assets with which the executor is chargeable; and his next business is to show what has become of this sum total. The first credit is for articles perished or lost. The cause of loss must be stated, for the surrogate is to pass on the sufficiency of the excuse offered, judicially—that is, whether “lost or perished without the fault of the

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executor." (Section 56.) He must credit himself with the decrease, and with the debts due the estate not collected. The fact whether they were collectible or not, being a fact to be judicially determined by the surrogate (section 65, subd. 3), the facts justifying the credit must be stated. The fact stated that they are not collected, will not justify the decree that they were not collectible. That they were not, must be shown by a proper statement. He must next then credit himself with the funeral charges and expenses of the administration. (Sections 54, 65.) He must then credit himself with moneys paid to creditors, naming them, and then with payments to legatees and next of kin. He must state the ages, condition in life of females, of legatees, and next of kin: and if any are minors, the fact must be stated, and whether they have guardians; and if so, their names and places of residence, and how appointed. The surrogate is to pass upon the propriety of the payments, if made to the legatees and next of kin; or if not paid, he is to distribute the surplus to them; and in either case these facts are indispensable. (Sections 65, 72.) If there is any other fact which has occurred as part of his proceedings, which may affect the estate, or the rights of any distributee, or his own rights, he is bound to state it. He must not only state in what character his payments were made, as which to creditors, legatees, or next of kin, or for expenses for funeral charges, or of administration, distinctly, but he must produce vouchers supporting each payment; or in cases of claims under \$20, where no voucher is produced, he must make and present, in lieu of vouchers, his own oath positively to the fact of payment, when made and to whom. When the executor shall have done all this, he will in the first instance have obeyed the order to render an account of his proceedings in the manner plainly written in the statute; and nothing short of this will answer: It is not his business to be wiser than what is written, and stop short of what he is commanded to do, or to go behind the order, because, according to his own speculations upon the subject, the command is more comprehensive than

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the exigencies of the case requires. Judgment does not belong to him. He is to obey, and not speculate. The mandate is judicial and peremptory, as to him, to render an account of his proceedings, not to the extent he shall deem proper, nor a part of his proceedings, but his proceedings as executor from the day he qualified until the day he answers the order. The applicant merely moves for the benefit of all interested, and all interested in each part and in the whole.

This account, when rendered in this manner, shows not only what is due to every other creditor, legatee, and next of kin ; it is, in fact, such a one as if required, may be finally settled. So that the surrogate, on inspection, could write on the bottom of it a decree of final settlement and of distribution without asking a question. This account when rendered, if not disputed by the applicant, is self-adjusted, settled as far as regards him. It discloses, of course, what is due to him, and he asks the surrogate to decree the payment thereof. This is done orally ; it would be unpardonable in the surrogate to require more of him. He may object to six cents as a credit, and the surrogate determines his objection. This is a settlement by the surrogate, whether he allows the objection or not. The determination is the settlement ; and being settled, it judicially appears what is due the applicant, and on being asked, the surrogate is bound to decree payment. Any statement in the account may be disputed, and the determination thereof by the surrogate is a settlement, and of necessity, when so settled, the account shows what is due to the applicant as well as to every one else. It is only making it true in the points in which it lacked in truth when presented. This statement, when made by the surrogate, is of no judicial force as between the executor and other parties. The accounts, as rendered, would however, as between him and all other parties, have the force of an admission, if they chose to avail themselves of it, from the fact that no one can compel the executor to have a final settlement. Each creditor, legatee, and next of kin has a right, as to himself, to have the

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accounts, as between him and the executor, settled by the surrogate, and his share decreed to be paid to him.

The executor may, however, apply to have the accounts thus required to be rendered by the order, finally settled. He accordingly takes a citation, and brings in all the parties interested to attend the settlement. The process is the same as above stated. If, on inspection, the parties are satisfied, the surrogate by decree settles the account finally, and decrees payment to all; and if disputed, he makes it true, and distributes to each and all. It is as indispensable, when the settlement is as to one, that the share of all should appear, as it is when the final settlement is made, all being parties. This is necessarily so, and is manifestly the design of the statute. All the provisions of the statute contemplate but one proceeding under the statute, but different stages of the same proceedings on "the same" account required by section 52. The executor is to produce his vouchers on the accounting, whether self-justified, settled, or finally settled. He is to be examined on oath touching the payments and property and effects, not in any one stage of the proceeding, but on the accounting on the settlement or the final settlement, as the case presents itself. The allowances to be made by the surrogate for losses is to be made, whether settled or finally settled.

[The surrogate here goes on to discuss the doctrine that no petition or citation is a necessary preliminary to the granting of an order requiring an executor to render an account of his proceedings. This doctrine of the surrogate is not now the practice of the Surrogates' Courts, and the contrary is established by the cases of *Gratacap v. Phylfe* (1 Barb. Ch., 485), and *Westervelt v. Gregg* (*Id.*, 469). This part of the surrogate's opinion is therefore omitted.]

The surrogate has not the jurisdiction to try or to establish a disputed debt, under any circumstances. Such jurisdiction is exclusively in the common-law courts. He can determine the fact, whether the debt be established or not. It is part of the accounting, whether this and all other debts have been

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established by judgment, by admission directly made, or by failure to dispute or reject them, and is one of the most important questions to be settled.

NEW YORK COUNTY—HON. ANTHONY L. ROBERTSON, SURROGATE—
December, 1848.

*In re VANDERVOORT.**

In the Matter of the account of PETER H. VANDERVOORT, executor of WILLIAM VANDERVOORT, deceased.

The executor is accountable only for what he has actually received as proceeds of sales; and where real estate, subject to a power of sale by the executor, has been sold under a decree of a Court of Chancery, and the proceeds paid over to the heirs, by order of that court, the executor is not bound to account for such proceeds in the Surrogate's Court.

Where a will creates a trust of the rents of real estate for the benefit of a family, while "they continue such," and there is no similar trust of the proceeds of the sale of such lands, under a power contained in the will, such power, though not limited in terms, cannot be exercised until the family is broken up.

At common law, the spiritual courts had no jurisdiction over real estate or its proceeds; and the provisions of 2 *Rev. Stat.*, 110, § 57, and *Laws of 1837*, 536, § 75,—giving the surrogate power in such cases,—only apply where there is an out-and-out conversion, and not where a mere discretionary power to sell or to make division is given.

A power of sale, where the grantees of such power have authority to make such partition as they deem best, is not an imperative power or an out-and-out conversion, as will give the surrogate jurisdiction.

Though a power to sell, for the purposes of distribution, be an entire conversion of land into money; yet, if one of the distributees die before actual conversion, the conversion, so far as his representatives are concerned, is not complete, and the executor is accountable for the proceeds only to his heir, and not his personal representatives.

A. F. SMITH, *for Applicant.*

J. L. MANN, *opposed.*

* Reported in 7 *N. Y. Leg. Obs.*, 25.

IN RE VANDERVOORT.

THE SURROGATE.—The application for the account in this matter, is made by the administrator of Robert Bruce Vandervoort, a son of the testator. The applicant claims that the surviving executor, who is cited to render such account, should in addition to his account of personal estate, account for the rents, and the proceeds of the sale of lands. To this the executor objects: 1st, that the land having been sold by proceedings in Chancery, *in invitum*, the proceeds were paid over to the heirs of Mr. R. B. Vandervoort, by the authority of that court, and he has nothing to account for; 2d, that the heirs, and not the personal representatives of the deceased, are alone entitled to any account; 3d, that this court has no jurisdiction to compel an account of the rents received by him.

As to the *first* point, as the executor can only be made accountable for what he actually received as proceeds of sales, he undoubtedly is not bound to account for moneys paid over by the Court of Chancery to the heirs.

The second and third points will be found to depend on the question, whether this be an "*out-and-out*" conversion by the will, as will be seen by separately considering them. The will made in 1836 devises to two persons, since deceased, and the applicant's intestate (who are also therein appointed executors), as joint-tenants, all the estate of the testator upon trust, to receive the rents of the real, to collect the personal, and out of such moneys to pay the premiums of insurance, and reasonable amounts for the maintenance of his family, "so long as they remain as such;" and "on the further trust, that they have power to sell every part of his real estate," and dispose of the consideration-money, so received for the sale, towards the payment of incumbrances, or otherwise, at their discretion;" and that "all moneys coming into their hands, up to the period of the settlement of his estate, which shall remain as a balance, shall be distributed and divided to and among his children, or the children or child of any child who may be dead, as if he had died intestate." It also provided that the executors might, from time to time,

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"make such divisions, exchanges, and dispositions of all his real estate among his children, as might be beneficial to his estate." The present executor was added by a codicil.

The first question that arises is, whether the children of the deceased intestate take as heirs of their father, if the estate was unconverted at the time of his death, or as purchasers under the will; and it is contended by the executors, they take in the latter capacity under the clause, "children of those who are dead." The time of death must, of course, depend on some other contingency, and the only period indicated is that of "the settlement of the estate;" and the only settlement of the estate pointed out, is when the "family" cease "to remain together as such." Until that takes place, there is a trust of rents and personal estate for their support. No provision is made for a like trust of the income of the proceeds of the sales of real estate; it is not to be presumed that the power of sale was to be exercised, and the proceeds divided among the parties before the family separated. Indeed, as its suspension would depend on the parties electing to keep together as a family, it would plainly be a sensible mode of producing family harmony and union, and such appears to have been the testator's object. Even if, therefore, "the moneys remaining as a balance," be not simply that portion of the personal property which remained unexpended on the purpose of trust (to which construction I incline, as the executors are afterwards authorized to divide the land specifically), the children of those who were dead when the family broke up, would take as purchasers, and be the only persons entitled to demand an account. If, however, the sale was to be for general purposes of distribution, it still remains to be examined whether the property descended to the children as real estate, or passed to the personal representative of Robert B. Vandervoort, as personal assets. This, as the property was not actually sold by the executors, would depend on the question, whether the conversion was out and out.

The other point will also be found on examination, to de-

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pend on the same question. At common law, spiritual courts had no jurisdiction over the payment of debts at all, or over real estate or its proceeds; land not being subject to the payment of certain debts at all, created the distinction between legal and equitable assets; the former being those where preference was observed, and the latter where the proceeds were brought into a court of equity and distributed equally among all the creditors of the testator. (2 *Williams on Executors*, 133.) Spiritual courts, therefore, never had any power to apply the proceeds of the sale of real estate to the payment of debts, because they never were legal assets; the *dicta* to the contrary, in *Bogert v. Hertell* (4 *Hill*, 494), and *Stagg v. Jackson* (1 *N. Y.* [1 *Comst.*], 208), are wholly unsupported by reason or authority, and were not necessary to the decision of those cases; in fact, the case of *Silk v. Brine* (1 *Bro. Ch. C.*, 188, in notes), cited in the former, directly contradicts it, and the work cited in the latter (*Ram on Assets*), in a subsequent part to that quoted (p. 321), states that the authorities cited in the former part have since been overturned by subsequent cases, two of which I shall now examine. The *first* is that of *Clay v. Willis* (1 *Barn. & Cress.*, 364). That was an action at law for money had and received; the plaintiffs were administrators with the will annexed; the defendant was an executor of an agent of two executors under the will, who were also devisees of real estate in trust to sell to pay debts; a prior mortgagee had sold the land after the testator's death, and paid over the surplus of proceeds to the defendant's intestate as agent of the executors; the action was held not to be maintainable, because the assets were equitable, and could not have been recovered by the original executors *qua* executors. The second is that of *Barker v. May* (9 *Barn. & Cress.*, 489). That was an application for a prohibition against a consistorial court, to prevent its taking cognizance of a claim for a legacy made by a legatee against a devisee, in trust to sell by a will which gave the legacy, and in which the proceeds were directed to be deemed part of the personal estate, to pay the

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legacy in question and other legacies. The Court of King's Bench granted the prohibition, because the assets were equitable; and Lord TENTERDEN added, that the direction to consider the proceeds personal estate, could not alter their legal character. Since those cases, no one has been bold enough to attempt to enforce payment of debts or legacies in a common law or ecclesiastical court, out of the proceeds of the sale of real estate. I am, therefore, satisfied that I have no jurisdiction over these proceeds at common law.

The statute of 1822 (*Laws of 1822*, 203, § 3), provided that wherever lands were sold under a power contained in a last will, the same might be distributed by a surrogate; this converted such proceeds into legal assets, and subjected them to preferences. The Revised Statutes, in 1830, changed this phraseology, and inserted the word "*ordered*," still preserving their character as *legal* assets, by the express direction that the distribution should be as of personal property in the hands of an administrator, which still subjects them to the priority of certain debts. (2 *Rev. Stat.*, 110, § 57.) Subsequently the Legislature, in 1837, added another provision, that the proceeds of sales made in pursuance of a testamentary authority might be brought into the surrogate's office for distribution; but it was made *equitable* assets by the subsequent clause which placed them on a footing with the proceeds of real estate ordered to be sold by the surrogate on the application of creditors, which were ratably distributed. (*Laws of 1837*, 536, § 75.) There can be no question that the statutes of 1830 only applied to cases of out-and-out conversion; not only from the change of language from that of the old statute, and the legislative interpretation put on this section by the act of 1837, but also from the fact that the immediately preceding section speaks both of the cases where lands are devised to be sold, and where they are ordered by will to be sold, whereas this speaks of but the latter only. The case of *Stagg v. Jackson* (1 *N. Y.* [1 *Comst.*], 206), under the equity of this statute, where land was ordered to be sold, has held that rents, which are to form a common

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fund with the proceeds of the sale, are also to be accounted for before the surrogate as a species of limited conversion, overlooking the fact, that assets are specifically enumerated in the statute (2 *Rev. Stat.*, 82, § 6), which was not urged in the Court of Appeals on the argument, although the revisers in their notes declare, in that enumeration, their object to have been to save all questions as to what constituted assets.

The only question that remains, therefore, is, whether the executors were not allowed by the will any discretion as to selling, so as to make it a complete conversion. I think, without undertaking positively to say, that their power of sale was intended to be confined to paying off incumbrances. The power to make divisions without sale, if they deemed best, takes away the imperative character of this authority to sell, and makes it alternative to sell or divide, as they think proper, and does not order them to sell absolutely: for this reason, I think this case does not come within the statute, and the Surrogate's Court has no jurisdiction.

There is also another ground upon which I think the present applicant has no right to require an account. Though a power to sell for the purposes of distribution be an entire conversion of land into money, yet if one of the distributees die before actual conversion, the conversion so far as his representatives are concerned is not complete, and the executor is accountable for the proceeds only to his heir (*Smith v. Olaxton*, 4 *Mad.*, 486; *Bogert v. Hertell*, 4 *Hill*, 494); so that in this case the children of Mr. R. B. Vandervoort, not his administrators, would be the proper persons to require an account, and the Court of Chancery has so held, and ordered the proceeds paid over to them.

I have withheld, as unnecessary, any consideration of the question, whether this executor had any power over the real estate, as the codicil only gave the same powers and interests to him as if he were nominated an executor in the will. Nominating him as executor would not give him the power, and the power is given to the parties by name and not to executors generally.

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Upon the whole, therefore, I am of opinion that I have no jurisdiction over real estate or its rents in this matter, and that if I had, the present applicant is not the proper person to claim it; the question of costs as to this claim must be disposed of in the final decree.

NEW YORK COUNTY—HON. ANTHONY L. ROBERTSON, SURROGATE—
December, 1849.

*In re PLACE.**

In the Matter of the accounting of NELSON PLACE, administrator de bonis non, &c., of JOHN ADAMSON, deceased.

An administrator's account ought to present clearly, so as to be seen at a glance, results, in reference to which the decree is final, so as to enable the court readily to make the abstract required by law, and an omission to do so is ground of legal suspicion; but an account cannot be rejected, merely because it mingles with statements as to personal property, statements as to the proceeds of real property.

An heir-at-law, who, upon an accounting of the administrator, knowingly receives from the court in which such accounting is had, a certain sum as his share of the proceeds of land sold by such administrator, is estopped, in equity, from denying the validity of the sale.

The power of an executor at common law is confined to personal estate. An executor has power over real estate, *ratione officii*, in three cases only.

1. Where no trustee to sell is named, and the proceeds of land sold are to pay debts and legacies. 2. In cases under the provisions of the Revised Statutes (3 *Rev. Stat.*, 109, § 55), permitting a sale by those executors alone who have proved a will. 3. In cases where the survivorship of a naked power to sell is in question, where one of several donees of it, also made executors, remained.

Where an executor is removed by a surrogate, the person succeeding to the administration is not chargeable with moneys collected by the former, or the value of chattels to whose use a legatee is entitled for life by the will.

Statutory provisions conferring on administrators with the will annexed the right of exercising powers of sale given to executors—stated.

* Reported in 7 *N. Y. Leg. Obs.*, 217.

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THE SURROGATE.—This is an application to enforce an account by an administrator with the will annexed, of assets left unadministered by a former executor. An account has been rendered by him, to which several objections are made by the applicant. These objections may be reduced to three. *First.* As to the form of rendering the account by mixing personal and real estate together. *Secondly.* That the administrator has included in his account the proceeds of certain lands belonging to the testator, sold by him by virtue of a power given in a will to the executors therein named. *Thirdly.* That he has not accounted for assets in the hands of the former representative.

As to the first objection.—If the statement offered as an account comprehended a full detail of all assets received and paid out, and of the condition of the estate, I do not know that a Surrogate's Court, not being a court of record, can lay down strict rules for the government of litigants as to the form of presenting their rights; but a confused and miscellaneous statement must always be looked at with suspicion; particularly where the statute itself points out the effect of the account when passed. The account ought to present clearly, so as to be seen at a glance, those results in reference to which the decree is final, and so as to enable the court readily to make the abstract required by law. A deviation from established practice must be looked upon as being intended to obscure the investigation, and therefore the presumption must be against their accuracy in weighing evidence; but I do not know that I have the power to reject accounts simply because the different elements are intermingled. This objection I must, therefore, overrule.

In reference to the second objection, it is urged, that if the administrator with the will annexed choose to become responsible for the sum inserted as the price of the lands, the heir cannot be prejudiced, as his title to the land, if any, would remain unimpeached. But I apprehend that the effect of a decree, on the basis of admitting this item, and the payment of the amount to the next of kin, would be precisely the same

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thing as payment directly by the administrator of the proceeds of the sale, as such, to the heir, and that the latter receiving them as such would be estopped, at least in a court of equity, from denying the purchaser's title (*White v. Swain*, 3 *Pick.*, 365; *Jennison v. Hapgood*, 10 *Id.*, 77; *Hicks v. Cram*, 17 *Verm.*, 449), for, by not objecting, he induces the administrator to part with the money. It is therefore incumbent on the court to pass upon this question of his power in a proceeding like this, where both parties are actors.

It becomes necessary, in the first place, to consider the power of an executor, as such, at common law. That power will be found to be strictly confined to the personal estate; of that he was the "*hæres nominatus*;" the residuary legatee, after payment of debts and legacies. It was only by help of a supposed claim on his conscience, by words of trust in the will, he was subjected to the jurisdiction of ecclesiastical tribunals as trustee for the next of kin. Every elementary writer, even the most modern, defines and treats him as such representative of personalty alone. Blackstone entitles him "the person to whom the execution of a last will and testament of personal estate by the testator's appointment is confided." (2 *Com.*, 503; see *Farrington v. Knightly*, 1 *P. Wms.*, 548, 549.) As far back as *Shepherd's Touchstone*, the only things described as assets in his hands, are "goods, chattels, actions, and commodities," all being personal. This principle is adhered to and taken for granted in all existing statutes, in regard to the duties, powers, and control over executors and administrators. Letters of administration are entitled of the "goods, chattels, and credits," of intestate persons (2 *Rev. Stat.*, 73, § 63), which in subsequent parts of the statute are considered as synonymous with assets. Their power to commence suits is confined to the personalty. (2 *Rev. Stat.*, 113, § 3.) The inventory which is to be filed, is of goods, "chattels, and credits" (2 *Rev. Stat.*, 82, § 2), which are termed assets in the enumeration of what are to be assets (*Id.*, § 6), and in one section (§ 7), the distinction between an executor and a devisee is marked. The final account which

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is to be rendered, is solely of personal estate (2 *Rev. Stat.*, 94, § 65). It thus appears that the Legislature had distinctly in view, in framing the statutes as to executors and administrators, their limited authority.

"But," as an excellent writer on the powers of executors observes (2 *Williams on Ex.*, 1033), "there are besides various interests frequently forming part of the estate of an executor or administrator, which are not recognized as assets in law, and which, therefore, if administered at all, must be administered in equity. This latter portion of the estate, in the hands of an executor or administrator, is called equitable assets, in contradistinction to the former, which is called legal assets. In other words, legal assets are such as are liable to debts in the temporal courts, and legacies in the spiritual, by the course of law. Equitable assets are such as are liable only by the help of a court of equity." The grand practical distinction to suitors, as to those two kinds of assets, was, that legal assets were subject to preferences among creditors, while the other were distributable equally; this distinction is observed in the only cases where, by statute, proceeds of lands in the hands of an executor are made amenable to the jurisdiction of Surrogates' Courts. Generally, the assets in the hands of an executor are to be applied in a certain order of priority to the payment of debts. (2 *Rev. Stat.*, 87, § 27.) If a will orders real estate to be sold to pay debts, where the conversion is "out-and-out," the surrogate before whom it is proved, has jurisdiction to decree distribution; but then the same order of preference as to debts is to be observed as if originally personal property. (2 *Rev. Stat.*, 110, § 57.) But in case of a sale of land by order of the surrogate (2 *Rev. Stat.*, 106, § 38), or where it is merely authorized by a will to be sold by executors (*Laws of 1837*, 537, § 75), (which is discretionary), the proceeds are to be divided equally among all creditors, without observing any preference. While this distinction seems to have been kept in view by the framers of those statutes, they seem also to have considered distinct and separate provisions necessary

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to give a Surrogate's Court jurisdiction over the proceeds of land. This latter necessity was pointed out by the decisions which settle that the proceeds of land sold by authority of a will are merely equitable assets. (*Clay v. Willis*, 1 *Barn. & Cress.*, 364; *Barker v. May*, 9 *Id.*, 489.)

The statutory provisions referred to, make the distinction between an out-and-out conversion and a discretionary authority, by a marked difference in the language. In addition to this, the three sections relating to the sale of real estate under an authority contained in a will (2 *Rev. Stat.*, 105, §§ 31, 32, 33), use only the word "executors;" yet in all other parts of the statute, where a duty common to both is spoken of, "executors and administrators" are always coupled together; taking for granted, therefore, that such power can only be exercised by an executor.

From these considerations, it follows, that by this body of statutory law, the character of the executor and his peculiar trust are preserved. The court, by whom he is appointed, and who has jurisdiction over his conduct, is confined in its exercise to personal property. Express additional jurisdiction is conferred on it only in specific cases, in which the distinction between the trust property which passes into his hands as trustee or as executor is still preserved. In giving such additional jurisdiction, its exercise is confined in terms to the original trustee, and not extended to any substitute appointed by the Surrogate's Court. And lastly, the commission of such substitute in the shape of letters of administration, is simply to administer "goods, chattels, and credits." (2 *Rev. Stat.*, 73, § 23.) Provisions, therefore, for conferring additional powers upon the administrator, must necessarily be anomalous, and not intended to be subject to the general provisions of the statute, and can derive no support from the general scope and object of the statute; or in other words, ought to be strictly construed.

This view will be found to be greatly strengthened by a variety of other provisions in the statute, which would render the execution of a power of sale of lands, or a trust to sell

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them by an administrator with the will annexed, mischievous in the extreme. First, as to the person to be appointed; secondly, as to notice of the proceedings to the parties interested; thirdly, as to the proof of the will as far as it relates to lands; fourthly, as to the security; and fifthly, as to his accounting. A court of equity is unrestrained in its discretion as to the person to be selected as a trustee; and relationship has no effect; nay, most frequently the nearest relatives are the object of the trust, or *cestuis que trust*, particularly where they are females, such as wives, children, or those who are children of the same parent. Yet the surrogate has no discretion, unless there is a personal objection, but must appoint the widow first, and then the next of kin (2 *Rev. Stat.*, 71, § 14); and not unless there is no residuary legatee, or principal, or specific legatee, though they have no interest in the real estate, can he exercise unlimited discretion in the appointment. Secondly, the appointment is made without notice to any of the *cestuis que trust*. (2 *Rev. Stat.*, 74, § 27; 76, § 35.) Thirdly, it is not prescribed anywhere that any investigation shall be made into the execution of the will as a will of real estate, before granting letters of administration with the will annexed; nay, they may even be issued on a will proved abroad as a will of personal estate only. (2 *Rev. Stat.*, 70, § 6.) Of what avail would the deed of such an administrator be? Lastly, the only accounting and distribution by the order of the surrogate prescribed, is of personal estate (2 *Rev. Stat.*, 95, § 72), except that under the two sections to which I have already referred (2 *Rev. Stat.*, 110, § 57; *Laws of 1837*, 537, § 75), which are in terms confined to executors strictly, and are made separate objects of jurisdiction. Nay, it was deemed expedient in the very clause which is alone relied on for the power claimed, to add the words prohibitory of the exercise of power, the qualifying words, "as such executor." (2 *Rev. Stat.*, 71, § 15.) These latter, of course, would be unnecessary, if there were no distinction in the powers of executor and devisee in trust.

But if such a power be anywhere given, it would clash

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with the powers given to the Court of Chancery. The statute in regard to trusts (1 *Rev. Stat.*, 728, § 55) speaks of executors, but says nothing as to administrators with the will annexed; and that, although two of the trusts enumerated are those usually discharged by executors. It also provides expressly that on the death of a surviving trustee, the trust shall devolve on the Court of Chancery, and be executed by some person appointed by it for the purpose. (1 *Rev. Stat.*, 730, § 68.) It may also accept a resignation of, or remove, a trustee and appoint a new one (*Id.*, §§ 69, 70, 71); which provisions are also extended to powers in trust. (*Id.*, 734, § 102.) It does not require much imagination to suggest extraordinary conflicts of jurisdiction, unless the Court of Chancery is deprived of it where a trust is attached to an appointment as executor, or even in any case where a trust is created by a will; for, clearly, it cannot appoint an administrator, which power is exclusively vested in the Surrogates' Courts: and if it should appoint a testamentary trustee, and the surrogate appoint an administrator with the will annexed, whose powers are to predominate? If the Court of Chancery removes a trustee, it may appoint a new one; does he become administrator also? No one can believe, when this statute was drawn and passed, its framers, or the legislative body that adopted it, dreamed of a surrogate appointing a testamentary trustee of lands.

I think the clause of the statute in question (2 *Rev. Stat.*, 72, § 22) may, after this examination of other statutes upon similar subject-matters, be handled without any danger of giving it an extended signification beyond its ordinary interpretation, unless too plain to admit of doubt: in such case, we are bound to think the lawmakers had some object in view which has escaped our observation. The language, which is peculiar, is as follows: "The administrators with such will annexed shall have the rights and powers, and be subject to the same duties, as if they had been named executors in such will;" not, "the persons named as executors in the will," nor even, "as if they had been executors;" but

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simply, as "if they had been named executors." This phraseology, "being named executors," is used throughout the statute; by which it is evidently intended to convey only the idea of the use of such language in the will as would confer the ordinary powers of executors, and not as though the names of the administrators were to be considered as being substituted in the will in the place of the persons designated as executors. "To name a person an executor" in a will, gives him certain definite powers (*God. Orph. Leg.*, 2, ch. 5, § 1); and if he has any other powers, it must be by some other mode than naming him an executor. It is barely possible that the words of this statute could be literally complied with, and the powers of a devisee in trust conferred on an administrator, where a testator, without giving the names of his testamentary trustees in the clause devising to them, should devise lands in trust to the parties "therein named as executors," and should afterwards name his executors; but it still would be adverse to every other part of the statute. In this phrase the language is slightly varied from that of the statute on which it is founded (1 *Rev. L.*, 316, § 21), where it is, "as if they had been executors named" (or designated) "in the will," which much more strongly favors this interpretation, now contended for; its stress being not on the epithet of "executors," but as if their names had been inserted in the will; yet even it was never imagined to convey such power. Another clause (2 *Rev. Stat.*, 71, § 15) is called in aid of the suggested interpretation, which prescribes that "every person named *as* executor in the will, and not named as such in the letters testamentary, shall have no power as such executor;" but it is actually adverse to it, for it has been thought necessary to add in it the words "as such executor" to the general restriction,—implying, of course, other powers subsisting in him besides those as executor. The object of this provision was solely to change the law, by which the admission of a will to probate gave full power to the persons named as executors in it, without any letters testamentary.

I therefore do not see that the literal interpretation of the

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words of this clause requires the gift to administrators of all the powers of a devisee in trust, as assumed in the case of *Egerton v. Conklin* (25 Wend., 225). But it seems to be supposed that there is a species of intermediate interest in real estate where the rights of a personal representative and a devisee in trust do not clash; that this is not strictly either assets or a trust estate, but the executor is supposed to have control over it, not as executor strictly, but "*virtute officii*," that expression for this purpose being understood to mean his office, instead of being his mere duty, as it ought to be interpreted. I have been much embarrassed to understand what is meant by this interest; whether it means powers and trusts given by a will to the executors of it, not by name, but designating them by that term, or whether it means the gift of powers to discharge executors' duties; that is, pay debts and legacies, and make distribution. It is to be remembered that a devisee's rights are complete on the death of the testator; an executor's, not until after probate. The proof of a will before the surrogate as a will of real estate is only *prima-facie* evidence of its execution (2 Rev. Stat., 58, § 15), while letters of administration are issued on its proof as a will of personal estate only (2 Rev. Stat., 69, § 1). So, too, if the controversy be carried on in different courts, a will might be avoided as to one and not as to the other subject of its disposition. Nay, the will might not dispose of a particle of personal estate, and appoint no executor, so as to be incapable of being proved as a will of personal estate; will it be contended that a devisee in trust could not sell without probate? This idea, however, of an executor's powers over real estate "*virtute officii*," may be traced to three sources. First, where the proceeds of lands are to be applied to the payment of debts and legacies, which are the duties of an executor, and no trustee to sell is named, it is presumed to have been the intent of the testator that a person named as executor should be such trustee. (*Sugd. on Pow.*, 4 ed., 174.) Secondly, under the statute of 21 Henry VIII., ch. 4, substantially the same with 2 Rev. Stat., 109, § 55, passed to

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remedy the defect, in case parties do not take upon them the execution of a will containing a power to sell; in that statute, the words "lands willed to be sold by executors," deceased, were held to include devises to executors to sell (*Co. Litt.*, 113, a); but that interpretation was limited to cases where the devisees were executors to an estate given to them *as executors*, or to enable them to make distribution. (*Denio v. Judge*, 11 *East*, 288; *Bonifant v. Greenfield*, *Oro. Elis.*, 80.) Thirdly, in cases where the survivorship of a naked power was in question, where one of the several donees of it who were also made executors, remained: there, where the power was given to the parties by name, and not to the executors, its survivorship was doubted. (*Sugd. on Pow.*, 167, 4 ed.) It is only in these three classes of cases, and either in reference to the person who was to take, or the character of the power, or its survivorship, that the question can arise of taking a power not "*virtute*," but "*ratione officii*;" that is, not by force of having the duties of an executor to perform, but by reason of being an executor. (*Co. Litt.*, 113, a; *Sugd. on Pow.*, *supra*.) After a diligent investigation of all the cases, I have been unable to find any other in which the fact of being clothed with the powers of an executor has any effect upon a power over land. I do not, therefore, perceive how any of these principles can have the effect of vesting an administrator with a power of sale of lands.

But it may be wondered how so apparently sweeping a provision crept into the statute. If we trace it to its source, it will be found to have originated in a statute whose object was not to prescribe the powers of those who were to distribute, but the rights of the distributees, and formed an isolated provision in the English statute of distribution (2 *Ed. Stat.*, 395, § 9), from which it passed into the revision of the laws of this State, in 1787 (1 *Greenl. L.*, 368, § 16), directing the will of a testator to be observed, even where there was an administrator. In laws passed in 1801 (1 *Rev. L.*, 541, § 29), whose title did not have the slightest reference to real estate, and only prescribed the duties of executors, was added

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the provision that the act should extend to administrators with the will annexed, with the view of preventing unnecessary repetition in the body of the act, when executors were spoken of; with this view also it was transferred to the statutes of 1813 (1 *Rev. L.*, 316, § 21), from which it was adopted in the Revised Statutes. In none of the periods of existence of those statutes was the power ever sustained, although the want of any concurrent provisions inconsistent with such interpretation might have rendered it much more plausible than under the present statute.

With this mass of concurring testimony, I am constrained to decide according to the opinion of the Supreme Court in *Conklin v. Egerton* (21 *Wend.*, 432), that the administrator with the will annexed cannot exercise a power of sale contained in a will, though some judges of the court above, on an appeal taken in that case (25 *Id.*, 225), seem to have come to a summary conclusion to the contrary. Their views are mere *obiter dicta*, as the decision was put on other grounds: for neither is the language as broad as they seem to suppose, as I think I have shown; nor is the inconvenience of appointing a testamentary trustee by the Court of Chancery greater than that of appointing any other trustee; and the section to which I have already referred (2 *Rev. Stat.*, 71, § 15), on which so much stress is laid, only prohibits powers "as executor," and not generally; and it may be more rationally doubted whether the appointment of an administrator, the mere representative of personal estate, at all affects trusts or powers created by devise, than whether he acquires control over them.

For these reasons, I must hold the sale of lands by the administrator with the will annexed void, and the proceeds thereof, as well as the rent of the land, must be excluded from the accounts, as well as all moneys paid out on account of the real estate.

In regard to the third objection to this account, as to the omission to charge the administrator with money or property in the hands of the executor, he is not chargeable with any

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moneys collected by that executor, for which the parties have their remedy against his representatives, but only with such assets as came specifically into his hands or were lost by his neglect. So, too, he is not chargeable with the value of any chattels in the use of which a life-estate is given to the widow of the testator, or any other person; the parties in remainder having their remedy, in case of danger, by requiring security.

The account must, therefore, be referred to an auditor with the usual powers, who is to amend it by excluding therefrom all charges for the proceeds of real estate sold, or any payments or expenditures on account of real estate, and is only to charge against the administrator moneys lost by his negligence, or the value of any articles left in the hands of a legatee who had a life-estate therein.

NEW YORK COUNTY—HON. EDWARD. C. WEST, SHERIFF—
November, 1858.

THE WESLEYAN UNIVERSITY, ETC. v. THE TROY CONFERENCE ACADEMY.

In the Matter of the Last Will and Testament of LUCRETIA
VAN PELT.

The testatrix died February 6, 1856, and among other legacies in her will, she bequeathed a certain sum to the Troy Conference Academy, at West Poughkeepsie, New York. On the 12th day of January, 1857, the trustees of the academy executed a lease to a private individual for nine hundred and ninety-nine years, at a nominal rent, it being fully provided that the lessee should "carry on the school contemplated by and in the charter, or acts incorporating the same, according to all the conditions of said acts of incorporation."

Held, that the legacy became vested in the academy on the death of the testatrix; and whether the subsequent execution of the lease operated to dissolve the corporation or not, the fact of such previous vesting controlled the course of the legacy and entitled the academy thereto.

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E. L. FANCHER, *for the Residuary Legatees.*

I. A foreign corporation must prove its corporate existence and user; an exemplification of its charter and proof of user are requisite. (*Williams v. Bank of Michigan*, 7 *Wend.*, 539.)

II. A corporation has no other powers than such as are specifically granted, or are necessary to carry into effect the powers expressly granted. (*People v. Utica Ins. Co.*, 15 *Johns.*, 358.)

III. A corporation may be dissolved by a surrender of its corporate rights (*Slee v. Bloom*, 19 *Johns.*, 456); and if a corporation suffer acts to be done which destroy the end and object for which it was instituted, it is equivalent to a surrender of its rights. (*Ib.*; 2 *Rev. Stat.*, 463, § 38.) So "if it suspends its ordinary business." (*People v. Bank of Hudson*, 6 *Cow.*, 217, 220.) The rule adopted in all the cases which have occurred on this question seems to have been this: that where the effect of the surrender is to destroy the end for which the corporation or the corporate capacity was instituted, the corporation or the corporate capacity is itself destroyed. (2 *Kyd on Corp.*, 467.)

IV. In all gifts to a corporation, a charitable use is implied. Such gifts, which do not fall within the legal notion of charity, are void. (*Owens v. Missionary Soc. of M. E. Ch.*, 14 *N. Y.* [4 *Kern.*], 380, 410.)

WILLIAM P. CHAMBERS, *for the Troy Conference Academy.*

I. The bequest should be paid over to the Troy Conference Academy, unless the residuary legatee shows, 1st, that the bequest is invalid; or 2d, that the legatee is incompetent to take. The validity of the bequest itself not admitting of any question, it is sought to defeat the same by showing that the legatee has become incompetent to take. That incompetency is predicated of the fact that the legatee has executed a lease of property belonging to it for nine hundred and ninety-nine years.

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II. The chief question that arises is, whether the execution of the lease referred to has worked a dissolution of corporate existence. In this case, a dissolution can only be pretended to arise out of either *surrender* or *forfeiture*. It is not claimed that there has been a technical surrender and acceptance, nor that there has been a dissolution judicially declared upon proceedings by *quo warranto* or *scire facias*—all which are necessary to constitute surrender or forfeiture. (*Code*, § 429.)

III. The lease in question was executed January 12th, 1857, while the will was made in 1852, and the testatrix died in 1856. The lease disposes of a specified portion of the corporation's property, and assumes to pass nothing more. It undertakes to confer none of its franchises. It was expressly executed for the purpose of carrying on the institution established by the charter, and nowhere contemplates the abandonment or surrender or transfer of a single franchise. The utmost that can be said is, that the corporation has disposed of a certain portion of its property to pay its debts. The literary institution established by the charter remains. The trustees continue to be appointed by the Troy Annual Conference of the Methodist Episcopal Church, and constitute "a body corporate and politic," as declared by the charter.

IV. The charter does not require the corporation to possess the property in question. Unless, therefore, this act of disposing of a certain portion of its property to pay its debts has worked a dissolution of its corporate existence, there is no reason why this legacy should not be decreed to be paid over to it.

V. Admitting that the lease could not be lawfully executed, still, that does not of itself, even though it should be cause of forfeiture, work a dissolution. (2 *Kent's Com.*, 359, and cases cited; *Conn. & P. River R. R. Co. v. Baily*, 24 *Vermont*, 465; *Brandon Iron Works v. Gleason, Id.*, 228.) But beyond all question, the corporation had full power to make the lease. (*Angell & A. on Corp.*, 170.) In *De Ruyter v. St. Peter's Church* (3 *N. Y. [3 Comst.]*, 238), the

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Court of Appeals held that "the power of a corporation to assign its property in trust for the payment of its debts cannot at this day be doubted. It has been settled law, not only in this State but in other States."

VI. A corporation may sell all its property, and still remain a corporation. (2 *Kent's Com.*, 359.) "It does not follow that a corporation is dissolved by the sale of its visible and tangible property for the payment of its debts, and by the temporary suspension of its business, so long as it has the moral and legal capacity to increase its subscriptions, call in more capital, and resume its business." (*Brinckerhoff v. Brown*, 7 *Johns. Ch.*, 217; *Mickles v. Rochester City Bank*, 11 *Paige*, 118; *State v. Bank of Maryland*, 6 *Gill & John.*, 205; *Boston Glass Manufactory v. Langdon*, 24 *Pick.*, 49; *State v. Rives*, 5 *Iredell [N. C.]*, 309; *Brandon Iron Works v. Gleason*, 24 *Verm.*, 228.)

VII. But a reference to the respective dates of the will, the death of the testatrix, and the execution of the lease, shows that the legacy vested in the Troy Conference Academy before the execution of the lease, which is the alleged ground of the surrender.

VIII. To deprive the Troy Conference Academy of this bequest would defeat the manifest intention of the will. The same institution remains, unchanged in every particular, and still promoting every object for which it was originally chartered.

J. A. MAPES, for the Executors.

THE SURROGATE.—The testatrix, Mrs. Lucretia Van Pelt, by her will makes fifteen bequests, the largest number to religious societies, and bequeaths the residue of her estate, real and personal, to "The Wesleyan University of Middletown, Connecticut," and to "The New York Annual Conference of the Methodist Episcopal Church." These societies are of the number taking general legacies; the testatrix directing one thousand dollars to be paid to the former, and fourteen hundred dollars to the latter. All the legacies have

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been promptly paid by the executors, except the one under consideration.

The legacy in dispute is to "The Troy Conference Academy," located at West Poughkeepsie, in the State of New York. The ground taken by the residuary legatees, the two religious societies above mentioned, is, that the charter of the New York academy has been surrendered in consequence of non-user. This academy became embarrassed, and the trustees, in order to free the same of debt, for a certain consideration, executed a lease to a private individual for nine hundred and ninety-nine years, at a nominal rent, it being fully provided that during the term this individual should "carry on the school contemplated by, and in the charter or acts incorporating the same, according to all the conditions of said act of incorporation." The lease appears to have been drawn with great care; and after a number of recitals and covenants, provides that if the lessee shall fail to perform any of the conditions or covenants, the corporation shall re-enter: it is also provided that the lease shall not become valid until it receives "the approval and sanction of the Troy Annual Conference of the Methodist Episcopal Church." It is not in evidence that this approval and sanction have ever been obtained. The execution of this lease is the sole ground urged of surrender by reason of non-user.

Two or three dates, however, will dispose of the case. The charter of the academy was granted by the Legislature of New York, on the 26th day of October, 1834. The testatrix died February 6th, 1856.

Letters testamentary were granted on the 7th day of April, 1856. After a long negotiation, the lease above referred to was executed. It bears date 12th of January, 1857, and was recorded on the thirteenth of that month.

These dates show that the legacy became actually vested, beyond all possible dispute, in this academy, nine months before the alleged surrender of their charter. If this legacy had been to an individual, it would have gone, in the event of death, after vesting, to his executors and administrators.

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The charter of the academy allowing it, as it does, to receive legacies, &c., in what respect can the case be made to differ from that of an individual? What has the surrender of its charter, by reason of non-user, to do with the matter, when that surrender, if it ever occurred, occurred nine months after the legacy had been vested?

The case is therefore disposed of upon the above grounds; but if it appeared necessary to consider the question of surrender, I should decide, without a moment's hesitation, that no body of men could have taken more precautions than the trustees of the Troy Conference Academy to shut out the possibility of an inference that they intended to surrender the charter of this institution by the execution of the lease. In fact, the lease is nothing more nor less than a contract to carry out the charter. How can that be said to be a surrender?

The legacy must be paid, with interest from the 6th day of February, 1857. The costs to be paid by the estate, with a counsel-fee, to be settled by the surrogate, to the counsel for the academy.

KINGS COUNTY—HON. ROSWELL C. BRAINARD, SURROGATE—January, 1859.

KEARNEY v. THE BROOKLYN INDUSTRIAL SCHOOL ASSOCIATION AND HOME FOR DESTITUTE CHILDREN.

Where a father, by an instrument in writing, surrendered his infant children to the custody of a charitable institution, with the powers and subject to the provisions contained in its act of incorporation;—*Held*, that notwithstanding such surrender, the surrogate may appoint a general guardian of the children. The obligations of such a guardian are not inconsistent with the guardianship which the institution may claim under the act of its incorporation.

John Laffin died December 17th, 1858, intestate, leaving two children: Catharine, aged about five, and Mary Ann,

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about three years of age, and no widow. December 13th, 1858, he executed and delivered an instrument in writing, as follows:

"I, John Laffin, of the city of Brooklyn, father of Catharine or Kate, and Mary Ann Josephine Laffin, do commit and surrender said children to the care and management of the Brooklyn Industrial School Association and Home for Destitute Children, with the powers and subject to the provisions contained in the act incorporating the said Association and Home.

"Dated, Brooklyn, Dec. 13th, 1858.

his
JOHN X LAFFIN,
mark.

"Witness, ANNE KIMBERLY.

"Witness, SUSAN C. SMITH."

The following was written on the margin: "Catharine Laffin, born 26th October, 1853. Mary Ann Josephine Laffin, born 19th October, 1855."

The children remained with their father until his death, when they were taken by the Brooklyn Industrial School Association.

On the 22d of December, 1858, Thomas Kearney, the maternal grandfather of said children, presented a petition to the surrogate, asking to be appointed guardian of the persons and estates of said children. Notice of hearing was served on James Laffin, an uncle, and Ann Nolan, an aunt of said minors, on their father's side. The Brooklyn Industrial School Association and Home for Destitute Children, filed an affidavit proving the execution of said surrender, and claimed that the surrogate had no jurisdiction to appoint a guardian for said minors, by reason of the surrender.

After the decision of the surrogate that he had jurisdiction, an application was filed by James Laffin to be appointed guardian of said minor children.

JOHN GREENWOOD, *for Petitioner.*

JEROME C. SMITH, *for the Contestants and for Laffin.*

KEARNEY v. BROOKLYN INDUSTRIAL SCHOOL.

THE SURROGATE.—These children are daughters of John Laffin, who died in Brooklyn, on or about Dec. 15th, 1858, leaving no property.

Their mother died in March, 1858. One of the children is about five years of age, the other is about three years. They have no brothers or sisters, and it does not appear that their grandfather, on their father's side, is living.

During his last illness, and just previous to his death, their father signed a writing, by making his mark in the presence of witnesses, committing these children to the care and management of the Brooklyn Industrial School Association and Home for Destitute Children, a corporation organized by an act of the Legislature, passed in 1857. This association now has the custody of the children.

Mr. Thomas Kearney, the grandfather of the children on the mother's side, makes application to this court to be appointed guardian of the children. The appointment of Kearney was first objected to on the ground that the Brooklyn Industrial School Association, having the custody of the children by the consent of the father given in writing, they were, under their act of incorporation, the legal guardians of the children, and that the surrogate had no jurisdiction to appoint a guardian.

This objection was overruled, on the ground that there was nothing in the said act inconsistent with the provisions of the Revised Statutes under which application had been made for letters of guardianship, and that under the provisions of the statutes, the surrogate was bound, on application, to appoint some suitable person as guardian of the children.

Mr. Kearney was then objected to as being an unsuitable person, and James Laffin, an uncle of the children, made application to be appointed guardian.

The appointment of Mr. Laffin was also objected to as being an unsuitable person, possessing no means to provide for the children, and testimony was taken as to the character and circumstances of both applicants.

From this testimony it appears, that Mr. Kearney has a

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place of business in the basement of house No. 176 York-street, at which place he resides with his wife; that he makes and sells boots and shoes, and that the receipts from his business average \$10 per week; that he has some money laid aside, and that he is able and willing to take the charge of the children.

It also appears that the children resided much with Mr. Kearney during the lifetime of their parents, and that he assisted both the mother and father in their lifetime, because the father was sickly, and that he purchased a place of burial for the wife and another child of John Laffin.

It seems, also, that Kearney, in October last, took these children to his home from the poorhouse, at which place they had been placed by their father and James Laffin, because they were unable to support them for want of work.

James Laffin, who asks to be appointed guardian of the children, is, it appears, a young man, about twenty-three years of age, a varnisher by trade, and unmarried. He resides with his sister in the upper part of a rear house, known as No. 111 Concord-street. His means for providing for the children appear from the testimony to be precarious, depending upon whether he gets work as a varnisher. During the last fall, the father, James, and their sister, living together, could not support the children, and for this reason placed them in the almshouse at Flatbush.

So far as regards any expressed wishes on the part of John Laffin, relative to the care and custody of the children after his decease, there appears little in the testimony which would favor the appointment of one of the applicants in preference to the other. It seems, at one time he determined to give them to their grandfather, Mr. Kearney; and afterwards said he did not want them at Mr. Kearney's so long as he was able to take care of them. At another time he wished James and his sister to take care of them; and during his last illness, when asked by one of the ladies of the Industrial School Association, what provision he had made for his children, he said that he intended to leave them with his brother

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and sister. But afterwards, when the character of the School and Home was explained to him, he determined to give them into the charge of that institution, and signed a paper to that effect. His *last* expressed wish in relation to the children appears to have been, that the said institution should have charge of the children.

Mr. Laffin was poor and sick. It was natural that he should be anxious for the welfare of his children. Their grandfather wanted them given to him. His brother and sister wanted them. He did not know what to do. One of the ladies of the Industrial School Association swears that, up to a short time before his death, "he appeared lost as to the care of his children—what he should do with them;" and finally he concluded to give them to the Industrial School Association.

I cannot, of course, under the provisions of the Revised Statutes, appoint a corporation guardian of the person and property of these children; nor do I perceive any thing in the nature of the guardianship which the Industrial School Association may claim under the act by which they were incorporated, which can be inconsistent with the obligations of a guardian appointed by this court, to see that the children are properly cared for, even when in the custody of said institution.

There is no evidence before me as to the religious creed or belief of either of the persons who have petitioned for letters of guardianship. There was an offer of evidence to show that the father of the children was a Catholic, and received the sacrament of that church twice just previous to his death. But the testimony was objected to as immaterial and irrelevant to the case, and ruled out.

From the testimony in the case as to the character and circumstances of the two persons who have applied for letters, I am satisfied that Mr. Kearney is the most suitable person for guardian of these children, and that the prayer of his petition should be granted.

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On the order of the surrogate, appointing Thomas Kearney the guardian of the persons and estates of the children, a petition was presented on behalf of Kearney, as such guardian, to the county judge, stating that the children were detained and restrained from their liberty by the Brooklyn Industrial School Association, &c., and asked for a *habeas corpus*, commanding the respondents to bring the children before him. After the hearing, the county judge made an order discharging the children from the custody of the respondents, and ordering them to be delivered to the relator, Thomas Kearney, on the grounds:

First. That the decision of the surrogate, upon the surrender, was *res adjudicata*, and that the surrogate having pronounced the surrender invalid, the county judge was bound by such decision.

Second. That the surrender was conditional, and not to take effect until the death of John Laffin, and, therefore, invalid.

An appeal was taken by the respondents to the Supreme Court. The General Term, second district, reversed the proceedings and order of the county judge, and awarded a restitution of the children to the care and custody of the respondents. The opinion of the court, by BROWN, J., is reported in *People v. Kearney* (31 Barb., 430; S. C., 19 How. Pr., 498).

KINGS COUNTY—HON. ROSWELL C. BRAINARD, SURROGATE—September, 1859.

HEGEMAN v. FOX.

In the Matter of the final Accounting of the Executors of
AUSTIN D. MOORE, deceased.

A man does not lose his established domicile, and acquire a new one, while his absence is compulsory, or is dependent upon the happening of any

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contingent event; yet where a person in ill health is convinced that he cannot live in the climate of his domicile here, and he removes from it,—*Held*, not to be such a compulsory absence, continuing his domicile here, as that a change of domicile may not be established by proof of a fixed intention to abandon it, and to become a permanent resident of some other place.

The deceased, being in ill health, sold his house and furniture, and closed up his business here, and departed for the South, declaring that "he never expected to return; that he expected to make the South his home." He purchased, stocked, and cultivated a plantation in Florida, whither he removed, and lived with his family for over a year, and until his death.

Held, that the domicile of the deceased, at the time of his death, was in the State of Florida, and the widow was entitled to one-third of the personalty, according to the laws of that State.

The question is one of intent, and not whether the deceased was compelled to change his domicile by reason of ill health.

Deceased was a resident of Brooklyn until the fall of 1855, when, by reason of the low state of his health, it became necessary for him to go to a southern climate. Before he left, he made his will, which was duly executed in New York, October 19, 1855, whereby he devised and bequeathed his property to his executors in trust, to pay his widow a monthly sum, to be in lieu of her dower; and after paying certain legacies of small amount, to hold the residue upon certain trusts for his children. The will also appointed testamentary guardians of his children, and desired that they should have the sole custody of them, in exclusion of their mother. On February 10, 1857, the day of his death, he made a codicil to this will, in Florida, by which he revoked the appointment of the executors therein named, and in their stead appointed A. M. Reed, of Florida, and his brother, Asa Moore, his executors. On the final accounting of one of the executors, the widow claimed that the testator was domiciled in the State of Florida, at the time of his decease, and that by the law of that State she was entitled to one-third of his personal estate.

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BENJ. G. HUTCHINGS, for *Executors*, and JOHN DIKEMAN, guardian ad litem, for *Infants*.

I. At the time when the testator left here to go South, his domicile was in the State of New York.

II. For purposes of succession, there can be but one domicile; and a domicile once established, is not changed until the party has not only intentionally and decidedly abandoned it, but has actually acquired another, *animo et facto*, by a fixed residence there, coupled with the intention of making it his sole home for the remainder of his life. (*Somerville v. Somerville*, 5 Ves., Jr., 750, 787; *Munro v. Douglas*, 5 Maddock, 379; *Munro v. Munro*, 7 Cl. & Finn., 876; *De Bonneval v. De Bonneval*, 1 Curt., 859; *Stanley v. Barnes*, 3 Hagg., 437; *Bempde v. Johnston*, 3 Ves., Jr., 201, 202; *Craigie v. Lewin*, 3 Curt., 435; *Whicker v. Hume*, 13 Beavan, 366; 5 Eng. L. & E., 52; S. C., 7 Clarke's House of Lords' Cases, 125; *Lond. Jur.*, October, 1858; *Story on Conf. of Laws*, §§ 41, 44, 47; *Matter of Roberts*, 8 Paige, 519, 524; *Matter of Wrigley*, 8 Wend., 133, 139; *Matter of Thompson*, 1 Id., 43; *White v. Brown, Wall., Jr.*, U. S. C. C. R., 217.) The *onus* of proving a change is on the party alleging it; and this *onus* is not discharged by proving residence in another place, which is not inconsistent with an intention to return. (1 *Burges' Comm.*, 34, 40; 1 Curt., 864; 7 Cl. & Finn., 891.)

III. A change of domicile is not effected by a residence coupled with an intention to remain an indefinite period of time, dependent upon any contingency, as health, travel, business, or pleasure. (*Phillimore on Domicil*, §§ 146-160, 193; 1 *Binney*, 349; 2 *Bos. & Pul.*, 229.)

IV. A man does not lose his established domicile and acquire a new one, while his absence from such established domicile is compulsory, no matter how long such absence be continued, if the same compulsory reason continue. Such compulsory reasons have been held to be exile; a change of government, endangering a person if he should remain; an office rendering absence necessary, such as the command of

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a fortress abroad; the position of an ambassador or foreign minister; and finally, ill health. (*De Bonneval v. De Bonneval*, 1 *Curt.*, 859; *Phil. on Dom.*, §§ 140-160; *Story on Conf. of Laws*, ch. 3, § 47, pt. 13; *Johnston v. Beattie*, 10 *Cl. & Finn.*, 138; *Haskins v. Matthews*, 35 *Eng. L. & Eq.*, 532; *Stanley v. Barnes*, 3 *Hagg.*, 437; *Isham v. Gibbons*, 1 *Bradf.*, 69; *Elbers v. U. S. Ins. Co.*, 16 *Johns.*, 128.) Whether the state of health is such as to make out a case of compulsion, is a question of fact. The removal of the testator was the only hope of life; and though he had concluded never to return, because he had given up the hope of recovery, it cannot be contended that the testator determined not to return in case he should recover his health sufficiently.

V. A well-established domicile once proved, will not be held to have been changed without clear and decisive proof of a fixed intention to change it. In case of doubt, the original domicile will be maintained. (*White v. Brown*, *supra*; *Munro v. Munro*, *supra*; *Lord v. Colvin*, *Lond. Jur.*, April, 1859; *Whicker v. Hume*, 13 *Beav.*, 366; 5 *Eng. L. & Eq.*, 52.) The acquisition of a dwelling-house is of no importance except as evidence of intention; and what weight is to be given to it in that view depends upon circumstances. (1 *Burges' Comm.*, 54; *Isham v. Gibbons*, 1 *Bradf.*, 69; *De Bonneval v. De Bonneval*, 1 *Curt.*, 864; *Munro v. Munro*, 7 *Cl. & Fin.*, 876.)

JOHN BERRY and ALEXANDER W. BRADFORD, for the Widow.

I. The succession to personal property is regulated by the law of the domicile of the deceased at the time of his death, as well in case of testacy as of intestacy. (*Phil. on Dom.*, 7.)

II. By the statute of Florida the widow is entitled to one-third of the testator's personalty, provided the testator's domicile be established as claimed. (*Thompson's Digest, Laws of F.*, 184, ch. 11, § 1; 185, ch. 12, § 2.)

III. Domicil is "a residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time." (*Guier v. Daniel*, 1

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Binney, 349, note.) 1. A domicile can be changed only *animo et facto*. 2. To establish a change of the domicile of origin, and the national domicile, requires stronger proof than in other cases. 3. The domicile is not lost, until a new one be acquired. 4. If the change be established, its duration is unimportant.

IV. The reason of effecting a domicile in any particular place is immaterial, provided the intent to effect it appears.

V. He totally abandoned his residence in Kings county, in October, 1855, and there is no proof that, if he ever returned to the North, it was his design to resume his former place of residence. (*Phill.*, 15, n. 6, 118, 122, 126, 128; *Story's Conf. of L.*, § 51.) He sold the house in which he lived, and his furniture. He closed his bank account, transferred all his money, and removed his family.

VI. He acquired a domicile in Florida. He purchased a plantation, and resided there for over a year, and until his death. The investment in this plantation, stock, &c., was \$25,000 and over, and it presented every appearance of a permanent establishment. He furnished the house, stocked and cultivated the plantation; caused his brother to remove from Ohio, with his wife and family, to take charge of his plantation as overseer. He lived there with his family, his wife and children. He took measures for the education of his children at home, though they had previously been placed at a Northern boarding-school. By codicil he appointed two residents of Florida executors, trustees, and guardians. He instituted legal proceedings, which in their nature implied a residence in Florida.

THE SUBROGATE.—In this case the widow of the deceased has refused the provision made for her in the will of her husband, and has elected to take her dower.

She also alleges that her husband, at the time of his death, was a resident of, and domiciled in, the State of Florida, and that by the laws of Florida, she, as such widow, is entitled

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to one-third of all the personal estate of which her husband died possessed, as her share thereof.

It appears to be conceded by all of the parties that the law of the domicil governs in the distribution of the assets in this matter. But the executors and the guardian of the infant children of Mr. Moore deny that Mr. Moore was, at the time of his death, domiciled in the State of Florida, and allege that his domicil was in this State.

Upon these allegations a large amount of testimony has been taken, from which it appears that Mr. Moore was born in the State of Massachusetts, where he resided until about the time he became of age. Then he afterwards resided in several places, until about the year 1846, when he came to this State and engaged in business in the city of New York. He soon after took up his residence in the city of Williamsburgh, at which place he purchased and kept a house, accumulated property, paid taxes, and assumed the privileges of citizenship.

All of counsel on both sides appear to take it for granted that Mr. Moore had lost his domicil of origin, and that he was, from the time he settled in Williamsburgh, up to the year 1855, domiciled in this State. During that year (1855) he sold his house and furniture, closed up his business, and started (Oct. 20th, 1855) for the South. In the early part of the year 1856 he purchased a farm or plantation near Jacksonville, in the State of Florida. He also purchased negroes, made some attempts to stock the farm and to improve it. He also induced a brother, then residing in Ohio, to move with his family to Florida, to act as overseer of the plantation. He continued to reside upon this farm until his death, on or about February 10, 1857.

It also appears that Mr. Moore had, for some time previous to his leaving Williamsburgh for the South, been in poor health; that the reason for his going South was, that he could not stand the climate of the North; that he could not live here; and hoped to prolong his life by living in a warmer climate.

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The question in this case is, not whether Mr. Moore was compelled by ill health to remove to the South, about which there cannot be a doubt, but whether or not, when he was convinced that he could not live here, but could live at the South, he determined to relinquish his domicile here and to become a permanent resident of some place at the South. Upon this point the testimony of Mr. Demill and Mr. Field is clear, that he broke up his family residence in Williamsburgh and departed for the South; and that he declared at the time of his departure "that he never expected to return," "that he expected to make the South his home."

If these witnesses are to be believed (and they appear to have occupied confidential relations with Mr. Moore, and to be in no way interested in the result of this matter, and to have no motives to conceal or misstate facts), Mr. Moore left with no intention of ever returning to reside here, but, on the contrary, with a fixed intention of residing at the South for the balance of his life. The letters of Mr. Moore, written after he arrived in Florida, are to the same effect. In one of them he states that he is now fully settled in his new home; and in another, that he is not liable to personal taxation in Kings county, because he did not reside there. His acts while in Florida go to show that he intended to make his domicile in that State. He purchased a plantation, sent for his children, and took means to educate them there. He commenced a suit in one of the courts of Florida, and put himself upon the record as a citizen of that State.

In my opinion, it is no matter what were the inducements for his leaving here and going South, provided he left with the intention of residing permanently at the South. Many persons have left a domicile in other States, as Mr. Moore did, and come to New York for the purpose of bettering their circumstances, and not because they preferred New York to the place of their birth as a residence, other things being equal. They came here from choice, and with the intention of residing permanently; but they left their domicile of origin upon a degree of compulsion, being satisfied that it

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was not for their interest to remain there. Thus Mr. Moore, in 1855, when he believed his health would be improved or his life prolonged by living in a warmer climate, determined to relinquish his domicile here, and to fix a new one at the South.

It is true, that some testimony has been given to show that he left this State with an intention of returning whenever the condition of his health should permit it. This testimony is not, however, of a satisfactory character. The witnesses do not appear to have occupied any confidential relations with Mr. Moore, and his declaration as given by them may have been made more for the purpose of answering questions put to him, than for disclosing his real purposes. Other testimony has been introduced to show that Mr. Moore, while at the South, and after he had purchased his plantation, expressed an intention of returning to the North. It does not show, however, that when he left his domicile in Williamsburgh it was with the intention of ever returning to it or to this State, and cannot therefore be considered as affecting the testimony of the witnesses Demill and Field, or as rebutting any of the testimony which goes to prove that he left Williamsburgh with the intention of residing permanently at the South.

I feel compelled, therefore, to decide that Mr. A. D. Moore was, at the time of his death, domiciled in Florida. And a decree must be entered, giving to his widow the portion of the estate allowed to her by the laws of Florida, as her distributive share.

STOW v. STOW.

NIAGARA COUNTY—HON. M. M. SOUTHWORTH, SURROGATE—March,
1859.

STOW v. STOW.

*In the Matter of proving the Last Will and Testament of
HORATIO J. STOW, deceased.*

Mere absence of an attesting witness from the State, abroad on a journey or tour, does not authorize proof of the will by proving the handwriting of the testator and of the witness. To entitle such testimony to be given, the witness must reside out of the State.

The statute providing for such proof, where all or any of the witnesses "reside" out of the State (3 *Rev. Stat.*, 5 ed., 139, 140, §§ 9, 12), imports something more than mere absence from the State. The word should be taken in its broadest legal signification, and means actual residence, without regard to the domicile.

THE SURROGATE.—The executor, in this case, propounds the last will and testament of the deceased for probate. One of the two witnesses to the will, James O. Putnam, of the city of Buffalo, is now temporarily absent on a tour in Europe. His family remain at Buffalo, and he is expected home this spring. It is proposed to complete the proof of the will by the testimony of the other witness, and by proof of the handwriting of the testator, and of the absent witness, on the ground that this testimony is admissible when a witness is out of the State. Whatever the rule of the common law may be, under the statutes of this State in proceedings before Surrogates' Courts with respect to proving wills, the evidence cannot be given. The cases in which this species of secondary evidence may be resorted to, are particularly mentioned, and the language is, that when all or any of the witnesses "shall reside out of the State," among other cases, this proof shall be received. (3 *Rev. Stat.*, 5 ed., 139, 140, §§ 9, 12.) These sections are obligatory in the instances specified, although they may not be in other cases not specified. • (*Peebles v. Case*, 2 *Bradf.*, 243.)

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The word "reside," as used in these sections, imports something more than the mere absence of the witness from the State on a journey or tour. The latter view does not give effect to all the words of the statute, as that would be its precise reading by striking out that term. The meaning of the expression, "not a resident of this State," and of the word, "resident," when used in our statutes, is very fully and ably explained by BRADFORD, Surrogate, in the case of *Isham v. Gibbons* (1 *Bradf.*, 69). From his reasoning, and the authorities cited by him, while it is apparent that in the provisions of our statutes relating to testamentary matters, the terms "resident" and "inhabitant" usually have the same purport, and are to be construed with reference to the "domicil" of the testator; there are, however, cases where a more liberal interpretation has been given to the words "resident" and "non-resident," and where actual residence, without regard to the domicil, has been held to be within the contemplation of particular statutes. I think the sections to which I have referred fall within this class; and as they relate to the remedies of parties, and modes of proceeding, the word "reside," as used in them, should be taken in its broadest legal sense, and should be held to apply where the witness is residing abroad; that is, having a fixed residence, without an intention of remaining, sufficient to constitute a domicil. But the witness, Putnam, is not within this rule. He is journeying from place to place, and stopping here and there, as a traveller only; and having no actual residence anywhere out of this State.

There may be instances where parties may be put to great inconvenience by the view taken in this case; but if this is the true interpretation of the law, it must be submitted to until a change is effected, not by courts, but by legislative authority.

As the evidence offered cannot be received, the hearing must be postponed, and the personal attendance of the witness procured, before the proof of the will can be completed.

HUNN v. CASE.

ONTARIO COUNTY—HON. ORSON BENJAMIN, SURROGATE—1859.

HUNN v. CASE.

*In the Matter of proving the Last Will and Testament of
JAMES G. HUNN, deceased.*

The statute does not confine the publication of a will to any prescribed words or forms of speech. The expression, if it convey the proper meaning, may be made orally, or in writing, or by signs, where there is occasion to use them, provided that the general sense and design of the enactment be complied with.

Thus, the reading of the will, which declares the instrument to be the testator's last will and testament, in the presence and hearing of the testator, at the time of its execution, and his recognition of it by requesting the witnesses to subscribe,—*Held*, sufficient to establish a publication under 2 *Rev. Stat.*, 63, § 40, subd. 3.

Proof uncontradicted, by one of the two subscribing witnesses, that the testator subscribed his name in the presence of both, the other witness being unable to recollect the fact,—*Held*, sufficient to establish the subscription of the testator.

This was a proceeding to prove a will propounded by the executor. It was contested by three of the heirs-at-law and next of kin, being daughters and joined with their husbands, on the ground, among others, that the will was not properly executed. The subscribing witness, Aranah Jones, testified that he saw the testator subscribe his name against a seal at the end of the will: that the will was executed on the day of its date, and that the testator's wife and several members of his family were present, and thinks that Wells Gooding, the other subscribing witness, was present, but does not recollect distinctly as to that: that both the witnesses signed the attestation clause at that time, in the presence of the testator, and by his request. The witness could not distinctly recollect that the testator declared the instrument to be his last will, though he was strongly impressed that he did so.

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The attestation clause is in these words: "The above instrument, consisting of one sheet, was now here subscribed by James G. Hunn, the testator, in the presence of each of us, and was, at the same time, declared by him to be his last will and testament; and we, at his request, sign our names hereto, as attesting witnesses." The instrument commences with these words: "I, James G. Hunn, of the town of Canandaigua, in the county of Ontario, and State of New York, do make and publish this my last will and testament."

F. O. MASON and C. J. FOLGER, for the Executor,

Cited *Stewart v. Lispenard* (26 Wend., 255, 297); *Remsen v. Brinckerhoff* (*Id.*, 325); 2 Rev. Stat., 63, § 40; *Nelson v. McGiffert* (3 Barb. Ch., 158, 162); *Jauncey v. Thorne* (2 *Id.*, 40, 52, et seq.); *Torrey v. Bowen* (15 Barb., 304); *Seguine v. Seguine* (2 *Id.*, 385); *Moore v. Moore* (2 Bradf., 261).

E. G. LAFHAM, for the Contestants,

Cited *Lewis v. Lewis* (13 Barb., 17; 11 N. Y. [1 Kern.], 220); *Seymour v. Van Wyck* (6 N. Y. [2 Seld.], 120).

THE SURROGATE.—It is not the policy of the statute, in prescribing rules for the making and publication of wills, to discourage testamentary dispositions of property. Its only object is to guard against fraudulent practices and impositions. Nevertheless, in applying and weighing the evidence, it is the duty of courts to require that the rules established by the Legislature be substantially complied with. From the nature of the subject, it is not to be expected that precisely parallel cases will often occur, so as to establish uniform precedents in all respects. Nor does the statute confine the publication to any prescribed words or forms of speech. Unlimited latitude of expression may be used, if it convey the proper meaning. And that expression may be made orally, or in writing, or by signs, where there is occasion to use them, provided that the general sense and design of the enactment be complied with. Neither is it necessary that

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all the facts to be made out should be established by the evidence of both the subscribing witnesses, notwithstanding that the statute requires two to insure the validity of the instrument, as a will of real estate. The testimony of one, uncontradicted, in the absence of all suspicious circumstances, is sufficient of the fact to be proved.

In the present case, the first and fourth requirements of the statute in the execution of a will, are distinctly and unequivocally established. The second requirement is not so positively proved. The first subscribing witness called, establishes the fact that the testator signed the will in his presence; but is not certain that the other subscribing witness was present, though he thinks he was. The fact that Gooding, the other subscribing witness, was present when the testator signed, is further strengthened by the circumstance that the will was read in his presence (instruments being usually read preparatory to signing); and by the declaration of the attestation clause, which the witnesses both signed by the testator's request.

The third requirement of the statute is still less distinctly proved by the witnesses. Neither distinctly recollects hearing the testator declare the instrument to be his will, although one of them, Jones, had an impression that he did so. Both of the witnesses, however, testify that the instrument was read in their hearing, and in the presence of the testator, containing the declaration that it was his will. And his recognition of it was manifested by his requesting the persons to subscribe as witnesses. The business habits of the witness, who drew the will, his general intelligence upon a subject in which he was frequently called upon to act, lend weight to the belief that the will was properly executed, while there is no circumstance or expression used by any one of the eighteen or twenty witnesses sworn, to discredit it, or excite the least suspicion that any informality was omitted or any unfairness meditated.

But it was testified to by several of the witnesses sworn, that the testator had recurred to the making of his will after-

IN RE LAWRENCE.

wards. It was not the case of a sick or superannuated old man, liable to be controlled or imposed upon by others, but a man whose faculties were unimpaired further than was natural at his age, which at that time was less than seventy years. Under these facts, proofs, and circumstances, the will is held to be properly executed, and is ordered to be recorded.

NEW YORK COUNTY—HON. CHARLES McVEAN, SURROGATE—1848.

*In re LAWRENCE.**

*In the Matter of the application to mortgage, lease, or sell
the real estate of ISAAC LAWRENCE, deceased.*

The authority granted to an administrator by the surrogate, to sell, considered merely as authority, is analogous to a power in trust to sell, as distinguished from a trust. It is a judicial decree that the lands be sold to pay the intestate's debts, as well as a judicial mandate to the administrator to execute the decree. His duty is similar to that of a sheriff on execution, and is strictly analogous to that of a master in chancery on executing a decree of sale, and he is vested with a like discretion with them.

Such an order of sale having been made, the administrator should be left free to execute it, and an application by an assignee of a creditor for an order directing the administrator to execute the order of sale in full, by selling all the land embraced in the order and not sold, will be denied. The proper remedy is by attachment, to enforce the order of sale already decreed.

The administrator is bound to show a sound discretion as to the mode of conducting the sale. He is not bound to consummate the sale, if, for any reason, it might be set aside by the surrogate on the ground of unfairness.

The fact that the widow has embarrassed a sale attempted under the order, or that it is probable that she will do so again, by spreading false reports as to the title being subject to her dower,—*Held*, not good cause to suspend the sale under the order.

It seems, that the general regulations for the descent and transmission of

* Reported in 6 *N. Y. Leg. Obs.*, 274.

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property, in case of the death of the possessor, to his widow, heirs, and next of kin, cannot be regarded as constituting a contract with them, so as to bring those laws within the prohibition of the Constitution of the United States, nor as vesting the expectants, under such laws, with rights or privileges within the meaning of the Constitution of the State.

On the 2d day of September, 1848, this court, then held by the Hon. David B. Ogden, on the application of the administrator, made an order for the sale of the real estate of the intestate. The property embraced in this order consisted of several valuable houses and lots within the county of New York. Previous to the order of sale, the dower of the widow in the lands of the intestate was assigned to her by the Court of Chancery, on proceedings instituted for that purpose in that court, to which she and the heirs-at-law of the intestate were parties. The assignment of dower was an equitable assignment; that is, instead of assigning her dower in each several lot of land, the whole property was considered as one lot, and one-third in value of the whole was assigned to her, so that she held her estate in dower in the lands of the intestate, in entire undivided improved lots. That portion of the land of the intestate thus assigned to the widow as dower, was embraced in the order of the surrogate, and directed to be sold. The order of the surrogate was executed in part, shortly after it was made, by a sale of a larger portion of the lands; and the proceeds, amounting to some \$140,000, were brought into the Surrogate's Court, and distributed among the creditors, no portion of them being retained to satisfy the widow's dower. A part of the property sold, on the application for confirmation of the sale, was ordered to be resold by the surrogate. The lands which were assigned to the widow as her dower, as well as some other portions, were not sold. An application was now made by the assignee of a creditor, whose debt had been established in this court, for an order directing the administrator to execute the order of sale in full, by selling all the land embraced in the order of sale, and not sold. In answer to this application, it was alleged that a well-concerted plan of de

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preciation had been arranged, by which the property if sold must be sacrificed as to the creditors, for the benefit of others. It appeared clearly, that in a recent attempt made by the administrator to sell, in pursuance of the order, the legal notice of sale published in the newspaper by the administrator was followed by an equally formal notice by the widow, stating that the lands advertised to be sold, in the advertisement of the administrator, were assigned to her by the Court of Chancery, and "that any title derived from the sale thereof, in pursuance of any order of the surrogate of the county of New York, or otherwise, would be subject to the said decree of the Court of Chancery, and of the life-estate of the said Cornelia Beach Lawrence" (the widow). It was also shown that an opinion in print, signed "Daniel Lord," supporting the widow's title claimed in her said notice, was in existence, and circulated previous to the contemplated sale. It was also proved that attempts were recently made by the widow to purchase the claims of creditors. It was alleged that she had purchased a large share of the debts against the estate. It was alleged also that this application was made for her benefit and at her instigation. It was claimed that by law the sale was free from all claim of the widow's dower, and that this application, if granted, was to be followed by the notice of the widow, and the circulation of said supposed opinion, with the design to sacrifice the property, and that such would be its effect, and that therefore the order compelling the sale should not be granted during her life.

W. B. LAWRENCE and DANIEL LORD, *for Petitioner.*

G. M. OGDEN and D. B. OGDEN, *for Administrator.*

J. G. KING, JR., G. F. TALMAN, W. B. LAWRENCE, JR., EDWARD SANFORD, W. VAN HOOK, F. PENTZ, A. D. DITMASS, A. W. CLASON, JR., B. ROBINSON, WILLIAM LAWRENCE, GEORGE S. FOX, *for Creditors opposing application.*

THE SURROGATE.—Has the surrogate the authority to grant the order asked? The answer to this interrogatory will in-

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volve the consideration of the force and effect of the original order of sale; the duties, power, and obligation of the administrator as the selected instrument of the law to execute the order; the authority of this court to enforce the execution of the order; and, if it have such authority, what is the proper mode of its exercise.

An administrator is the personal representative of the intestate, and succeeds to his personal estate. He is not the representative of the creditors, nor of the next of kin, although they are dependent on his administration for securing their interests in the estate. They have no legal representative, they act for themselves. An administrator has no title to, or interest in, the real estate of the intestate, nor is he invested with any power to do any act which will affect the interests of the heirs in such estate. In making the application to the surrogate to sell, he is the agent of the creditors specially appointed by the law for the occasion, by reason of his existing connection with the estate. This agent can, on his own motion, apply for the sale, or the creditors can compel him to apply. He cannot, of his own motion, make the application after three years have expired, but can be compelled by a creditor to make it after that time. The authority granted to him by the surrogate to sell, considered merely as authority, is strictly analogous to a power in trust to sell, as distinguished from a trust. It is a power. There is nothing lacking to make it a perfect power—a full authorization to sell. The power in him is derivative entirely, and is in no sense original, so as to invest him with any discretion in regard to it. The power is derived from the law. The instrument appointed to declare and give effect to the law is the surrogate, and not the administrator. The command of the law is addressed to him. His duty is obedience. He has no other obligation. Although the order may, as it affects the administrator and others, be regarded as an authority to sell, as it regards the administrator alone it is also a command to sell. It is not only a judicial decree that the lands be sold to pay the debts of the creditors, but it is also a

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judicial mandate to the administrator to execute the decree. It is not only so in form, it is also so in force and effect. What difference can there be between the force and effect of a judgment of this court, made in pursuance of law for the sale of the real estate of the intestate to pay creditors, and a judgment in the Court of Chancery, where the jurisdiction of the two courts is the same?

The decree of a high court is not more potential than the decree of an humble court: it is jurisdiction that confers power; and when the court has jurisdiction, it is the sovereign authority of the State that commands, than which no authority can be higher. The decree of this court is consequently as high an authority, of as much force, and as obligatory, as that of the Court of Chancery. It is a full and perfect appropriation of the lands. It commands the administrator to give effect to this appropriation by sale. He is the ministerial officer appointed by the law to execute this decree. His duty is similar to that of a sheriff on execution, and is strictly analogous to that of a master, on executing a decree of sale. His duties in executing the order, as prescribed by statute, are almost a literal transcript of the prescribed duties of a master. He is to advertise the sale at a prescribed time; he is to affix notices of the sale in public places; he is to report the sale for confirmation; and if confirmed, he is to execute a deed of conveyance to the purchaser; and he is to bring the money into this court to abide the order of distribution. This is a master's duty on the same decree, in detail, and his whole duty. His duties being the same as a master's in executing the decree, it follows that his powers and obligations are the same. He is not in any sense a trustee, nor can he exercise the discretion of a trustee. He has no more right to delay a sale than has a master. The exigency of the decree is, that he execute it presently, now. That fact is, as to him, judicially determined, and being so determined, has the force of a judicial determination; and a ministerial officer, who is called upon to execute the order, has no right to question its wisdom or

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expediency in this or any other respect. Passive obedience is his duty.

This application for a new order is founded in a supposed necessity of having an order more stringent in its requirements and more impulsive in its character than the order of sale. The order of sale, in the plainest terms, commands in itself its own execution: either that command is without force, or the order now asked for is supererogatory. The law has spoken in that order, and it is the only order it has authorized in express terms. I do not think that I could, by any order not recognized by law, nor contemplated by it, give any force to the order provided by law, to consummate its declared object. Any attempt to add to it, to make it more authoritative, would be to disparage its force and to detract from that fulness and perfectness which it possesses. Could I bring myself to believe that there was authority for this application, it would follow, in my belief, that the order of sale was not mandatory—that it was not a peremptory order to sell presently. That consequently the executor had a discretion, other than that of a sheriff or a master, to revise the order and consider its policy and delay the sale. If I possessed the authority to make this order (now asked), it would follow that the time of executing the order was not before judicially determined, and, of course, that a discretion as to its execution was left. In such a view of the case, I would be bound, in exercising such conceded discretion, to grant an order postponing the sale, or stopping it until such time as in my judgment the interests of the creditors would be best subserved. I cannot charge the means provided by the law to accomplish its end, with such uncertainty or imperfection. I regard the order of sale as full and perfect, both as an authority and as a command, and that it imposes as fully and as perfectly the correlative obligation of obedience on the administrator. I regard the order not only as full and perfect, and therefore incapable of being made better or stronger, but also as immutable. It must stand forever between these parties, unchanged. It leaves no discre-

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tion to me, or to the administrator, as to any matters determined by it. It is as binding on me as on the administrator, and its obligation is as perpetual as it is imperative. Nothing therefore remains for this court to do, except to enforce obedience to its decree; and, in my judgment, that is not done by reiterating its commands.

The provision of the statute conferring power on this court to enforce its decrees, is in these words: "Every surrogate shall have power to enforce *all lawful orders*, processes, and decrees of his court, by attachments against the person of those persons who shall neglect or refuse to comply with such orders or decrees, or to execute such process; which attachments shall be in form similar to that used in the Court of Chancery in analogous cases." (2 *Rev. Stat.*, 155, § 6.) The attachment is given to enforce all lawful orders. That this is an *order*, and that it is *lawful*, cannot be questioned, nor can it be questioned that, literally speaking, it is within the statute. On the supposition that the order of sale is an order within that provision, it will afford the fullest scope to make the exercise of power in this court analogous to that of the Court of Chancery. In such a case, whatever would justify a master from attachment, in not selling or proceeding to sell, would justify an administrator; and whatever would excuse a master would excuse the administrator. This will make the analogy perfect, as to the powers of the court to grant the order, the duties and obligation of him upon whom its execution is imposed, and the power of the court to enforce its execution. I am fully persuaded that this is the true construction of the statute, and that the precedents in the Court of Chancery will in all respects apply with equal force to this, and thus afford to all parties the opportunity of treading on familiar ground.

The embarrassments to the proper execution of this order, which the administrator has encountered and which he is likely again to encounter, arise from the claim of the widow to hold an indefeasible estate in dower in the lands ordered to be sold; and that any sale that is in the power of this or

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any other court to make, will give the purchaser no right to the possession of his purchase, nor to enjoy its profits, during her life. She does not rely in silence upon rights of which she cannot be divested. She is anxious to impress those views upon others. She is industrious in the use of means to depreciate the property, and make the sale practically to the creditors subject to her dower, whether it is so in law or not. That it is her design to make the cloud thick and dark over this title, is scarcely concealed. That she can have no interest to do so on the supposition that her rights are vested, is as manifest as her interference. The means that she uses are the best that could be devised to accomplish the end in view. The end is, to have the property sold at prices in which the purchasers will buy in reference to her supposed estate for life. The means are the formal notice accompanying the advertisement of sale, referring to a decree in chancery establishing her rights, and asserting her rights to be indefeasible; together with the circulation of the supposed opinion of Mr. Lord, supporting her claim. If this court has the constitutional authority to order the sale in the manner in which this has been done, which is the manner prescribed by statute, the interest of creditors in these lands to have them appropriated to the payment of their debts became vested at the death of the intestate, as much so as those of the widow; and it is against the first principles of justice, as well as against every principle of law, that a partition or division of lands or assignment of dower, in a proceeding in a Court of Chancery, in which the widow and the heirs only were parties, should be allowed to affect, in any manner whatever, the rights or interests of the creditors. The decree is binding upon the parties to it, forever. It is, as to these creditors, as if it had never occurred, in all matters affecting their rights and interests in this estate. It is, as to them, a perfect nullity. That it was the design and intent of the Legislature that the effect of the sale on the order of the surrogate should be to vest the purchaser with the title of the intestate, free from the very claim which is here set up, is too manifest

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to admit of question, and has not been questioned. The Legislature declares by law that such shall be the effect of the sale, in so many words. If it was competent for the Legislature to pass such a law, it is, beyond controversy, the law of the land. The authority of the Legislature to pass it is denied on the behalf of the widow, as being unconstitutional. The constitutional objections to the validity of the statute are, as I understand them, founded on the provisions of the Constitution of the United States, prohibiting a State from passing any law impairing the obligation of a contract; and on the provisions of the Constitution of this State, declaring that "no *member* of this State shall be disfranchised or deprived of any of the rights secured to any *citizen* thereof, unless by the law of this State, or the judgment of his peers;" and also, by implication, on the clause relating to the taking of private property for public use.

The statute passed after the marriage of a woman, allowing her dower to be admeasured to her in money instead of the land, which was the law at the time of her marriage, against her consent, is supposed to be in conflict with one or all of those constitutional provisions. This objection supposes that a general statute regulating the descent and transmission of property, in the case of death, is either a contract or a vested right, or privilege of citizenship or otherwise, so that those laws cannot be altered under the circumstances mentioned. The wife's right is this: the statute provides that in case she survives her husband, she shall, after his death, be endowed of his lands. The statute of descents provides that a son, who is an only child, shall succeed in fee to the same lands, in case the father shall die intestate, and shall not have sold the same during his life. The law promises the son, that in case his father shall die seized and intestate, the fee shall descend to him. The father dies seized and intestate,—can it be said that if the Legislature had changed or altered the descent after the father was seized and the son was born, and before the father died, that the law was unconstitutional, or that the son must take, notwithstanding the alteration? or

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can it be said, that because the wife's right depends upon the happening of one contingent event, and the son's on two, that they are different? The interest in neither case vests until the death of the husband or father; and the promise is equally strong to both, on the contingencies mentioned in each case. The rights in either case have the same characteristics. They are imperfect, inchoate, and contingent; alike imperfect, alike inchoate, and although not contingent in the same degree, alike contingent. Death of the owner, and death only, in either case, makes the right perfect. Death makes the wife a widow and the son an heir. If they die before him, no title dies with or descends from them; they have none to lose or transmit. They never had any. During the life of the husband, the wife can by statute release her imperfect right, or mortgage it, in conjunction with her husband; and so far, and so far only, is her right regarded in law. The son can bargain and sell his right of inheritance during his father's life, by a binding executory contract. So far are his rights regarded in law. The widow's right to administer, in case of intestacy, is of the same class of rights, and is considered a valuable right. I do not think that general regulations for the descent and transmission of property, in case of the death of the possessor, to his widow, heirs, and next of kin, can be regarded as constituting a contract with them, so as to bring those laws within the prohibition of the Constitution of the United States, nor as vesting the expectants under such laws with rights or privileges within the meaning of the Constitution of the State. If such laws are within the constitutional provisions mentioned, it follows that they cannot be changed so as to take effect while the wives and children of the existing generation can, as to themselves, show that the change was made after they became wives, or in case of the children, after they were born, for the promise is to all of them alike.

Statutes divesting persons of their fee in land, against their will, and giving them money in exchange, are constantly enforced in cases of partition in the Supreme Court and

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Court of Chancery, and in the same proceedings, widows are compelled to take their dower in money, against their will; yet I believe the constitutionality of these laws has never been questioned. This question, although involved in the discussion of this motion, I do not consider the point of the case, so as to require further discussion of it from me. As far as this court is concerned, it is a determined question. It was so determined by the surrogate when he granted the order. I deem it, however, proper, and as due to the administrator and the creditors, to say, that I regard the statute as clear and emphatic in its declaration, that the purchaser under the sale will take the lands free from the claim now set up by the widow, and that no other sale can be made; and that there is not, in my opinion, any constitutional impediment to its having its full force and effect as a valid law of the land, as it purports to be. So entirely am I persuaded of this, that I would not hesitate a moment as to my duty to invest the proceeds of sale for her use, and pay her the interest thereof. Should she, therefore, succeed to have this sale made as if subject to her dower, the creditors' interests will be subject to a double dower;—the one, practical, from such a consideration influencing the sale; the second, inevitable, from the absolute requirements of the statute.

Notwithstanding these embarrassments, it is the duty of the administrator forthwith to proceed with the sale. The embarrassments are not intrinsic, but casual and temporary. This sale is an ordinary remedy for the payment of debts; and for a court to authorize the forbearance to sell as a remedy for the payment of debts, because combinations supported by errors of opinion are at work to depreciate the value of the lands, would be to charge the administration of justice with a want of sufficient energy to accomplish its end; and would, in effect, be saying that truth had lost its moral force to dissipate error; neither of which propositions are admissible as a ground of judicial interference.

I have said that the administrator was not vested with any discretion in this matter. I meant, in the sense that it was

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claimed. He has a limited discretion. It is, however, the discretion of the sheriff on an execution, or the master on a sale. The statute says the sale shall be in the county where the lands are situated. To sell at Harlem would be a compliance with this statute, yet it would not be a discreet exercise of power, and this court would set it aside as not being fair; for, in the exercise of a sound discretion, he is bound to sell at the Exchange. The statute says the sale shall be made between the hour of nine in the morning and the setting of the sun; yet if made in this city at four o'clock in the afternoon, this court would set it aside, as not fairly made; for, in the exercise of a sound discretion, it ought to be sold at the usual hours of the sale of real estate at the Exchange. If the sale was advertised to be made at the Exchange in the morning, and a snow-storm should on that day block the streets so as to prevent purchasers coming, the sale would not be made fairly, if made; or if, while the sale was progressing, a fire should break out and call off the bidders, and thus prevent competition, and the sale was consummated under such circumstances, it would not be fair. If the administrator discovered, on the day of sale, a combination among men, the effect of which would be to destroy the ordinary competition, and should consummate the sale, it could not be regarded as fair. The surrogate is enjoined by the statute not to confirm the sale unless it be affirmatively shown that it was fairly conducted; and where the sale would, in the judgment of the administrator, if consummated, be palpably so unfairly conducted that the surrogate would be bound to set it aside, he need not, I think, consummate it, but may postpone it temporarily. This is the law as regards sheriffs and masters. If he has not the discretion of a trustee, or a judicial discretion, he is not an automaton, to move only as he may be acted upon. He is to have his eyes and his ears open, that he may see and hear every thing that may affect the sale. He is to be diligent in removing obstructions and impediments, whether arising from the elements or the contrivances of men. He is bound to have the sale fairly

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made, and the means that he uses must be those which will best secure that end. I think it would be his duty, if the sale was embarrassed with a claim that the purchaser would take subject to the widow's dower, to declare that such was not the effect of the sale; and that the sale was made on the condition that the conveyance by the administrator would convey the estate of the intestate "free and discharged from all claim of dower for the widow of the intestate," in the language of the statute itself. Nay, more; if in the exercise of sound judgment he is of the opinion that the embarrassments are such that a sale cannot be fairly made, unless the fullest scope be allowed to the purchaser to try the question of the widow's title in a competent court, before he shall be compelled to pay the purchase-money, it would be the duty of the administrator to take a nominal sum as part of the purchase-money, from a responsible purchaser in good faith, merely to give validity to the bargain, that such question might be raised on a bill for a specific performance by the administrator, and put in process of determination without loss to any one. In the exercise of a sound discretion he is also permitted to sell, on a credit of three years, for not more than three-fourths of the purchase-money, and submit such sale to the surrogate for his approval. He must adapt his means to the end, and that end must be the highest price. His own discretion is to guide his judgment under the law. What I have said by way of illustration of my views, is not to be considered advice. The administrator must be left free to act under the order as it is, and I must be left free from the embarrassments of extra-judicial advice when I am called upon judicially to review his conduct. This application is dismissed without costs to either party, and without prejudice to the rights of any creditor to make application for an attachment.

HOWELL v. BLODGETT.

ONTARIO COUNTY—HON. ORSON BENJAMIN, SURROGATE—1853.

HOWELL v. BLODGETT.

In the Matter of the administrators of MALONEY, deceased.

The provisions of chapter 80 of the Laws of 1847 (3 *Rev. Stat.*, 5 ed., 174 § 29),—authorising surrogates to compound debts belonging to an estate,—do not apply to demands against solvent debtors.

This was an application by Howell and others as administrators of one Maloney, an attorney and counsellor-at-law, for an order allowing a compromise between them and Blodgett, a debtor of the decedent. It appears that Blodgett, who is solvent, and one Arnold, who is insolvent and residing out of the State, became indebted to the decedent for a bill of costs in a suit in which he acted as their attorney. Blodgett claims that the retainers were separate and distinct, and that it was agreed between Maloney and himself and Arnold, that each of them should be separately responsible to Maloney for no more than half of his costs, and that he, Blodgett, has already paid a part of his share of the same, and is ready and willing to pay the balance due on his half of the costs. The administrators, therefore, apply for an order granting permission to compromise on such a basis.

THE SURROGATE.—This is not a case contemplated by the statute of 1847, chapter 80. It is rather a question of contract to be settled by evidence, than a case of compromising or compounding a debt. Although the terms of the act are general and comprehensive, we are not at liberty to shut our eyes to the facts and circumstances surrounding it and which occasioned its passage. We must consider, in its construction, what the old law was, the evil under it, and the remedy intended to be applied by the Legislature. Prior to its enactment, executors and administrators could not compound

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and compromise the debts due their testators or intestates, which were doubtful or bad, without being liable for the loss, personally. It was to remedy this evil that the act was passed, and not to provide a new tribunal for the construction of contracts and the liquidation of unsettled accounts with solvent debtors. Any other construction of the statute would be likely to accumulate a large and inconvenient addition of business in courts not originally constructed for the trial of issues. And although a result might be arrived at in bad or doubtful unliquidated claims, still strict investigation upon legal evidence would be necessary in cases of solvent demands.

Admitting the court to possess jurisdiction, which it disbelieves, still there would be an indelicacy, if not impropriety, in the case of solvent demands, for the court to step in between the administrators and the persons entitled to the estate, in advance of a final settlement.

MADISON COUNTY—HON. SIDNEY T. HOLMES, SURROGATE—June, 1859.

COLSON v. BRAINARD.

In the Matter of the application of the administrators of EBENEZER COLSON, deceased, to mortgage, lease, or sell his real estate to pay his debts.

At common law, neither the admissions of an executor or administrator, nor a judgment against him, can in any way bind the heir or devisee, or affect the real estate derived from his testator or intestate.

Upon the hearing of an application of the administrators for authority to sell so much of the real estate of the intestate as may be necessary to pay his debts, it is competent for a devisee of the real estate in question, or any persons claiming under him, to contest the legality or validity of a judgment obtained against the administrators, like any other claim or demand against the estate. The judgment is only *prima-facie* evidence of the debt of the intestate, and like all other *prima-facie* evidence, is

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liable to be controverted, impeached, or entirely disproved by any competent evidence.

The devisee being let in to contest the judgment, it was ordered that it be sent to the circuit on an order for a trial, under section 73 of the Code of Procedure.

This was an application on the part of Rollin Colson and Noble S. Colson, administrators of Ebenezer Colson, deceased, for authority to mortgage, lease, or sell the real estate of the intestate, to pay his debts, under section 40 of chapter 460 of the Laws of 1837. (3 *Rev. Stat.*, 5 ed., 187, § 2.)

In the list of debts annexed to the petition is a judgment in favor of Josiah Colson against the administrators, for \$1137.65 damages and costs, perfected and docketed July 7, 1858.

The petitioners were appointed administrators, April 14, 1856, and the judgment was recovered upon a claim against the deceased, presented to the administrators, and by an agreement in writing between them and the claimant, and the approval of the surrogate, referred, in pursuance of the statute, to Orrin Willey, Damon Richmond, and Aaron D. Dunbar. (See 3 *Rev. Stat.*, 5 ed., 175, § 41.) Prior to the hearing Mr. Dunbar resigned, and refused to act, and upon the application of the claimant at a special term of the Supreme Court, an order was made, appointing Ira P. Barnes a referee in place of said Dunbar, and directing said referees to hear said claim and report thereon to the Supreme Court.

The referees heard the claim, the administrators and the claimant each appearing with counsel; and the referees on the 19th day of May, 1858, made their report, by which they found that there was due the claimant the sum of \$1010, and interest from September 5, 1857, that being the day when the claim was presented to the administrators. No order confirming this report was obtained, and judgment was perfected and docketed thereon for \$1069.68 damages, and \$67.97 costs.

By the petition it appears that William G. Brainard has become the owner, by purchase from some of the heirs, of an

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interest in the real estate of deceased, which is sought to be sold by the petitioners; and he was duly served with notice of the hearing. Since the proceedings were instituted, Mr. Brainard has died, and his widow and heirs have appeared and been substituted in his place, and object to the claim of Josiah Colson above stated, upon the following, among other grounds, viz.:

I. The judgment is void for the reason that the referees were not appointed in the manner required by statute, the Supreme Court having no power to appoint Ira P. Barnes one of the referees. That such appointment should have been made by the agreement, in writing, of the parties, and the approval of the surrogate.

II. Said judgment is void for the reason that no order was obtained confirming the report of the referees as required by statute.

III. The judgment is not conclusive upon them, and they ask to be allowed to contest said claim. And they aver that the whole, or a large portion of said claim, is barred by the Statute of Limitations. That the claim is for the services of said Josiah Colson, who is a son of the deceased, rendered or performed while residing in the family of his father, embracing the entire period from 1809, when claimant became of age, to March, 1856, when Ebenezer Colson died. That said claimant was maintained and supported during all this time by his father. That he was feeble in mind and body, and that the services rendered were not worth his support. That there was no contract or agreement of any kind between said Ebenezer and Josiah Colson, that the latter should receive pay for his services. And that such services, whatever may have been their value, were fully paid for by Ebenezer Colson prior to his death.

J. MASON, for the Widow and Heirs of William G. Brainard.

J. B. ELDRIDGE, for Josiah Colson, the Claimant.

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S. S. ABBOTT, for the Administrators.

He objects to a rehearing of the claim, and presents a written protest of heirs owning an interest equal to seven-elevenths in the real estate of said deceased against a rehearing of said claim.

THE SURROGATE.—I have not examined the objections made to the regularity of claimant's proceedings in procuring the appointment of Barnes as a referee, and the entering of his judgment without an order confirming the report, for the reason that the conclusions I have come to, upon the last objection made to the judgment, render it unnecessary.

At common law, neither the admissions of an executor or administrator, nor a judgment against him, could in any way bind the heir or devisee, or affect the real estate derived from his testator or intestate. (*Osgood v. Manhattan Co.*, 3 Cow., 612; *Spraker v. Davis*, 8 Id., 132; *Baker v. Kingsland*, 10 Paige, 366, 368; *Mooers v. White*, 6 Johns. Ch., 360, 373; 1 Cow. & Hill's Notes, 403, ed. of 1850; 2 Id., 7, note 10.) This being the rule at common law, let us see how it has been modified, if at all, by statute.

It is provided (3 Rev. Stat., 5 ed., 747, § 12), "That the real estate which belonged to any deceased person shall not be bound, or in any way affected by a judgment against his executor or administrator, nor shall it be liable to be sold by virtue of any execution issued upon any such judgment."

By this provision, the real estate of a deceased person is placed beyond the reach of a judgment against his executors or administrators, and is not to be bound or in any way affected thereby.

As to the effect of such a judgment, when an application is made to sell the real estate of a deceased person to pay his debts, the statute provides, "That when a judgment has been recovered, or a decree obtained against an executor or administrator for any debt due from the deceased, and there are not sufficient assets in the hands of the executor or administrator to satisfy the same, the debt for which the judg-

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ment or decree was obtained shall, notwithstanding the form of such judgment or decree, remain a debt against the estate of the deceased to the same extent as before, and to be established in the same manner as if no such judgment or decree had been obtained, provided that when such judgment or decree has been obtained upon a trial or hearing upon the merits, the same shall be *prima-facie* evidence of such debt before the surrogate." (3 *Rev. Stat.*, 5 ed., 196, latter part of § 59; *Laws of 1837*, ch. 460, § 72, as amended by *Laws of 1843*, ch. 172, and *Laws of 1847*, ch. 298.)

The judgment in this case was obtained after a hearing upon the merits, and this provision makes it *prima-facie* evidence of the debt upon this application. It divests it of the character and force of a judgment, and makes it in the first instance evidence of the extent of the claim; but like all *prima-facie* evidence, liable to be controverted, impeached, reduced, or entirely disproved by any competent evidence.

No other construction would give any force to this provision. If, upon a hearing, the claim cannot be controverted like any other claim, then the judgment is conclusive, instead of *prima-facie* evidence of the debt. The judgment does not even change the character of the debt, or prevent the Statute of Limitations from running against it. It is not evidence of the costs of the suit; and they cannot be included in the debt and charged upon the real estate. (*Ferguson v. Broome*, 1 *Bradf.*, 10; *Skidmore v. Romaine*, 2 *Id.*, 122; *Sandford v. Granger*, 12 *Barb.*, 392; *Dayton's Surrogate*, 2 ed., 559, 560.)

If the judgment does not change the character of this claim, and it remains a simple debt against the estate of the deceased, then the persons representing the interest of Mr. Brainard in the real estate of deceased, should be allowed to litigate the validity and extent of the claim, and set up against it the matters stated in their third point. For it is further provided that "on such hearing it shall be competent to any heir or devisee of the real estate in question, and to

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any person claiming under them, to show that the whole of the personal estate of the deceased has not been duly applied by the executors or administrators to the payment of his debts, to contest the validity and legality of any debts, demands, or claims which may be represented as existing against the testator or intestate, and to set up the Statute of Limitations in bar to such claims; and the admissions of any such claims so barred, by any executor or administrator, shall not be deemed to revive the same, so as in any way to affect the real estate of the deceased." (2 *Rev. Stat.*, 5 ed., 188, § 13.)

This provision secures to the heirs or devisees, or any person claiming under them, the right, upon the hearing, to litigate or contest the legality or validity of any claim, and set up the Statute of Limitations. And the concluding portion of the section evinces the determination of the Legislature to carry out the doctrine of the common law, and protect the real estate from being bound or affected by the acts or admissions of the executor or administrator.

The heirs or devisees of Mr. Brainard are, therefore, entitled to be let in to litigate or contest this claim, and I cannot refrain from saying, that it is a principle of justice, in harmony with all law, that every person whose property is liable to be taken for the payment of a claim of this nature, should have an opportunity to be heard when the amount of that claim is fixed or liquidated.

It is also provided that "If, upon such hearing, any question of fact shall arise, which, in the opinion of the surrogate, cannot be satisfactorily determined without a trial by jury, he shall have authority to award a feigned issue, to be made up in such form as to present the question in dispute, and to order the same to be tried at the next Circuit Court to be held in such county." (3 *Rev. Stat.*, 5 ed., 189, § 14.)

By section 72 of the Code, feigned issues are abolished, and an order for a trial is substituted, which shall state the question of fact to be tried, and which shall be the only authority necessary for a trial. As the counsel for the claim-

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ant has requested that if a rehearing of this claim is ordered, it be sent to the circuit for trial, I am quite willing to assent to this request, trusting that this desire on the part of the claimant's counsel, coupled with the amount of the claim, and the principles involved in it, will be regarded by the justice who shall hold the circuit, as a sufficient reason for sending there for trial a case that in most instances would be sent to a referee for decision.

The parties interested may draw up such an order as will present, plainly and distinctly, the questions to be litigated in this case.

JEFFERSON COUNTY—HON. MILTON H. MERWIN, SURROGATE—April, 1860.

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In the Matter of the Administration of ABRAHAM BARBER, deceased.

The provision of the statute (3 Rev. Stat., 5 ed., 160, § 35), providing that where an application for administration is made by a person other than the one having the prior right, the applicant shall file a written renunciation of persons having such prior right, or a citation shall be issued to such persons to show cause—must be construed strictly. Nothing will satisfy the statute but a *written* renunciation, or a citation to show cause.

Thus, where letters of administration were granted to D. B. and A. B., who had the prior right, but were revoked on their failure to give new securities, and letters were subsequently granted to C., who was next entitled to them,—*Held*, that D. B. and A. B. were entitled to notice of the application of C. The failure of D. B. and A. B. to furnish new sureties, does not amount to a "written renunciation" within the meaning of the statute, nor does the previous notice or citation served on them to appear and file new sureties, dispense with the necessity of service of a citation on them, upon C.'s application.

Where letters of administration have been irregularly issued, without citing those having a prior right to the administration, they will be revoked.

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This was an application on petition and affidavits, by Dorcas Barber and Amasa M. Barber, to have an order made by the surrogate of Jefferson county, March 13, 1860, appointing Edward Converse administrator of the estate of Abraham Barber, deceased, vacated, and the letters issued to him annulled. The facts appear in the opinion.

D. C. CALVIN, *for Applicants.*

D. J. WAGNER, *for Administrator.*

THE SURROGATE.—It appears that on the 13th December, 1859, Dorcas Barber, widow, and A. M. Barber, son, were appointed administrators of said estate, and Edward Converse and Levi Miller were sureties on the bond of the administrators. Converse was the husband of Letitia Converse, who is a daughter of the deceased. Converse was also one of the appraisers of the estate. On the 28th February, 1860, Converse, on the application of A. M. Barber, and after citation issued to and served on him, was removed from his position as appraiser, on the ground that he was an interested party. On the same day, Converse applied to be discharged as surety for the administrators, and a citation was issued, returnable on the 7th March, requiring the administrators to appear and give new sureties, pursuant to the statute, which citation was duly served on the administrators. On the 7th March, the five days further time allowed by the statute was given to the administrators in which to give new sureties. On the 12th March, no new sureties having been given, the surrogate entered an order revoking the letters. On the 13th March, on the application of Edward Converse, letters were issued to him in the right of his wife, who was next entitled after Dorcas Barber and A. M. Barber, and no citation was issued to Dorcas or A. M. Barber, or any other notice given of the application of Converse; and these letters are now sought to be vacated, on the ground that no notice or citation was given or issued to said Dorcas or A. M. Barber. It was admitted by the counsel of both parties, on the hearing, that

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the only question to be now decided, was whether Dorcas and A. M. Barber were entitled to notice of the application of Converse. Other questions might perhaps arise on the papers, but this is the only one to be passed upon.

Section 35 of 3 *Rev. Stat.*, 5 ed., 160, provides that when any person applies for administration, and there shall be any other person having prior right to such administration, the applicant shall file with the surrogate a written renunciation of the persons having such prior right; or, if he does not do this, a citation shall be issued to all persons having such prior right, to show cause, at a day to be specified, why administration should not be granted to the applicant. The statute (3 *Rev. Stat.*, 5 ed., 164, § 54), which authorizes the surrogate to revoke letters on failure to give new sureties, makes no provision as to who shall be appointed in the place of the administrators removed, or how they shall be appointed. For aught that appears in the statute, the rights of all parties are the same as if letters had never been issued. The statute does not restrict the appointment to those that are subsequently entitled. If the person removed, the next day after his removal should apply to the surrogate and present proper bonds, there is nothing in the statute to prevent his being appointed; that is, the removal does not disqualify. This being so, when Converse applied, there were two, Dorcas and A. M. Barber, who had the prior right, and Converse must either file their written renunciation, or take out a citation. The statute requires the one or the other of these things to be done, and this must be complied with before the surrogate has authority to appoint.

It may be said that the act of the old administrators, in neglecting to give new bail, amounted to a renunciation. But when the statute says a *written* renunciation must be filed, I take it, it means what it says. Again, it may be said that no citation was necessary, because of the previous notice or citation served on them to appear and file new sureties. It is true that if, after this notice, they did not file new bail, they were presumed to know that their letters would be re-

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voked; but they were not presumed to know that some one else would apply for letters, or that Converse himself would do so, or when he would apply. They therefore have never had an opportunity to show cause why administration should not be granted to the applicant, Converse. It seems to me that neither the letter nor the spirit of the statute has been complied with in this respect. There is nothing in this case which satisfies the statute, when it requires either a *written* renunciation or a citation to show cause.

I have not been able to find any case in the books that bears upon the point at issue. I take the statute as it is, and construe it as it seems to me reasonable and just. This court has not such a general jurisdiction as will allow it to vary from the law as it stands written. If the views as above expressed are correct, the order granting administration to Converse, and the letters issued thereon, must be vacated.

It seems to be well settled by the decisions, that I have authority to revoke the order. (*Skidmore v. Davies*, 10 *Paige*, 316; *Vreedburgh v. Calf*, 9 *Id.*, 129; *Proctor v. Wanmaker*, 1 *Barb. Ch.*, 302; *Id.*, 452; *Public Administrator v. Peters*, 1 *Bradf.*, 100.)

JEFFERSON COUNTY—HON. MILTON H. MERWIN, SURROGATE—
June, 1860.

HOLLEY v. CHAMBERLAIN.

In the Matter of the Guardianship of CHARLES CHAMBERLAIN,
a minor.

In appointing a guardian of the estate of a minor, the best interests of the minor are alone to be consulted, and the surrogate is not restricted in his appointment to the relatives. He may appoint a stranger, who is shown to be competent.—*So held*, where all the relatives of the minor, excepting the mother, united in a consent to the appointment of the stranger.

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The policy of the law is against the appointment of married women as guardians of the estates of minors. And where the mother of the minor is living with a second husband, though otherwise competent, she will not be appointed guardian of his estate.

Nathan Chamberlain, paternal uncle of the child, applied for the appointment of Elon K. Downer, as guardian of the estate of Charles Chamberlain, a minor, of the age of five years, whose father is dead, but his mother is living. All the competent male relatives of the child, being five paternal uncles and two maternal uncles, consented to this appointment. On the first hearing, the mother opposed the appointment, claiming that she should be appointed. It was then admitted that the mother had recently married, and was then the wife of Theron Holley.

L. J. BIGELOW, *for Petitioner.*

J. CLARKE, *opposed.*

THE SURROGATE.—No question is made as to the competency of Mrs. Holley, the mother, except that she is a married woman, whose husband is not the father of the child. No objection is made to Downer, except that he is not a relative. So that the question here is, whether the mother, who is living with a second husband, shall be appointed guardian of the estate of the child, or the person chosen by all the other relatives, including two brothers of the mother. The property seems to consist of about \$100 personal, and real estate the annual rents and profits of which do not exceed \$100.

In the absence of any appointment, where a minor has real estate, the mother would be guardian, with the rights of a guardian in socage (3 *Rev. Stat.*, 5 ed., 2, §§ 5-7); but this guardianship is superseded by the appointment of the surrogate. (*Ib.*)

Section 34, chapter 460, of *Laws of 1837* (3 *Rev. Stat.*, 164, § 56), provides that in case a woman marries after being appointed an executrix, administratrix, or *guardian*, the sur-

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rogate, on the application of any person interested, shall have power to revoke such appointment; and the same section provides for a revocation in case of incompetency by reason of drunkenness, improvidence, or want of understanding. Section 32 (3 *Rev. Stat.*, 159) provides that no letters of administration shall be granted to a "person who shall be judged incompetent by the surrogate to execute the duties of such trust by reason of drunkenness, improvidence, or want of understanding, nor to any married woman;" but where a married woman is entitled, they may be granted to her husband. Now the same reasoning that would make a married woman incompetent to be an administratrix, would apply in case of the guardianship of the estate of a minor.

Again, the 34th section above referred to gives power to the surrogate to revoke letters in certain cases of incompetency, naming them; and no doubt when those cases appear, it is the absolute duty of the surrogate to revoke. The section then says, that in case a woman marries, the surrogate shall have power to revoke. This, of course, must mean, that although the woman is not incompetent for any of the reasons stated in the first part of the section, yet if she marries, that of itself is a reason for her removal. Taking both these sections above cited together, they seem to me a strong argument against the right of a married woman to be appointed guardian of the estate of a minor.

2 *Kent's Com.* (8 ed., 236, note c), makes a distinction whether the mother is married or not, giving her the preference only when she is unmarried. But I do not find the authority on which it is based. It is there stated to be the usual order to appoint the mother first, if unmarried. Almost all the cases reported are where there was a contest for the guardianship of the *person* of the child. The question is but little discussed as to the guardianship of the estate.

The Court of Chancery did not confine the guardianship of the estate to the relatives, but placed the property where it would be best taken care of. (See *Bennet v. Byrne*, 2 *Barb. Ch.*, 216.) One guardian of the person may be ap-

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pointed, another of the estate. (2 *Kent*, 227). The true interests of the infant are rather to be consulted than the interests or wishes of those who are contending for the guardianship. (*Bennet v. Byrne*, 2 *Barb. Ch.*, 216.) The discretion vested in the surrogate is not an arbitrary one. (*White v. Pomeroy*, 7 *Barb.*, 642; *Underhill v. Dennis*, 9 *Paige*, 202). Says JOHNSON, J., in *Williams v. Hutchinson* (5 *Barb.*, 123), "While the mother remains a widow she is bound to provide for her children, and is entitled to control them while under age, and to collect their earnings while in the service of others. But when she marries, her legal capacity is gone, and she can no longer control the persons, or property, or earnings, of her children."

The foregoing is about all the light I find in the books bearing upon this case, and it is exceedingly doubtful whether, in any event, a married woman should be appointed the guardian of the estate of a minor. The weight of authority, as well as the intent of the Legislature, would seem to discountenance the idea.

But let us consider what would be best for the interests of the child; for that should always, if possible, have a controlling influence.

The mother, even if unmarried, would be presumed to have less knowledge of business, less acquaintance with even the ordinary affairs of life, than a business man, and little or no experience in managing property. Mr. Downer, who is admitted to be a competent person, would, of course, in this respect, have qualifications superior to Mrs. Holley. The marriage of Mrs. Holley, even if not regarded by the law as a disqualifying circumstance, certainly cannot add to her competency. Marriage, for many purposes, disqualifies a woman; she is presumed to be under the influence of the husband, more or less. He is not a disinterested party; and I presume that in such cases the appointment of the husband as guardian would not ordinarily be asked for; or, if asked, not made.

It is suggested that if the mother is appointed, the property

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of both can be better managed together. It is not before me what property the mother has, but I doubt the propriety of mixing the property in its management. But if the guardian to be appointed should think it best to have the property managed together, it can of course be done if the mother so choose; and if the mother was appointed, the property would be kept together only as long as she chose to have it.

I do not, on the whole case, see how I can come to any other conclusion, than that it would be best for the interests of the child to have Mr. Downer appointed guardian of his property. This, of course, will not interfere with the maternal rights of the mother, as guardian of the person of the child. She will take care of him, and, whenever necessary, receive from the guardian sufficient of the annual rents and profits of the property to maintain and educate the child.

Letters of guardianship of the estate of the minor until he arrives at the age of fourteen years, and until another guardian be appointed, are therefore granted to Mr. Downer.

JEFFERSON COUNTY—HON. MILTON H. MERWIN, SURROGATE—September, 1860.

CALKINS v. CALKINS.

In the Matter of the Distribution of the Estate of SETH CALKINS, deceased.

Where a will bequeaths to the widow generally, all the personal estate for life, with remainder over, the whole must be converted into money and invested by the executor, and the income paid over to the widow.

The will read, "I give and bequeath to my beloved wife, Nancy, all my real estate, personal property, house, furniture, &c., to have and to hold as here as long as she shall live; and after her death, the property that is remaining I request to be divided among my surviving children," naming them. *Held*, that the bequest was general and not specific, and that the money in the hands of the executor, after payment of the

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debts, should be invested by him in permanent securities, and the income paid over to the widow.

This was an application for the final settlement of the accounts of the executor, &c., of Seth Calkins, deceased. The facts will sufficiently appear in the opinion.

THE SURROGATE.—From the account of the executor, there appears to be in his hands for distribution, as of 11th September, 1860, the sum of \$1,245.27, being the balance of the estate after paying debts, &c. The will reads as follows: "I give and bequeath to my beloved wife, Nancy, all my property, real estate, personal property, house, furniture, &c., to have and to hold as hers as long as she shall live; and after her death, the property that is remaining I request to be divided equally among my surviving children," naming them.

The question to decide is, whether the balance in the hands of the executor shall be paid over to the widow, or be kept in his hands, invested, and the annual interest paid to the widow.

In *Spear v. Tinkham* (2 Barb. Ch., 211), the testator gave to his widow the use and occupation of his personal property; and after her death he gave the property to a son, &c. It was held that the executor should have invested the property and paid the interest to the widow, but kept the principal for the remainder-man. The chancellor says: "As a general rule, where there is a bequest of the whole of the testator's personal estate, or of the residue thereof after payment of debts and legacies, to one person for life, with a remainder over to others, the whole must be converted into money and invested in permanent securities by the executor, and the income paid over to the person entitled to the life estate."

In *Covenhoven v. Shuler* (2 Paige, 122), the will gave the use of personal estate to the widow, remainder over. Held, that the executor must invest and pay over income. The chancellor says: "Where there is a general bequest of a residue for life, with remainder over, although it includes articles that will consume in using, as well as those that do

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not, and other property, the whole must be converted into money, invested, and the income only paid to the legatee for life."

So in *Hove v. Earl of Dartmouth* (7 Ves., 137), the will gave to the widow all the personal estate for her life. Held, where personal property is bequeathed for life, with remainder over, and not *specifically*, it is to be invested and interest paid over. A bequest of personal estate is not specific, merely from being combined with a devise of land. Every devise of land is of necessity specific, whether in particular or general terms: otherwise as to personal property. (See, also, *Fearns v. Young*, 9 Ves., 549; 2 *Williams on Ex.*, 1257, 1058-59.) If personal property is bequeathed *specifically* to one person for life, with remainder over, then the property is to be enjoyed *in specie* by the tenant for life. But when the bequest is not specific, then the property must be invested, and the tenant for life paid the income. (2 *Williams on Ex.*, 1058.) But when any indication is to be found in the will of an intention, by the testator, that the property is to be enjoyed *in specie* in its existing state, it shall be so enjoyed. (2 *Williams on Ex.*, 1059.) The cases cited in *Williams* as exceptions to the general rule, appear to be English cases, and, as far as I have examined them, apply to leasehold property and annuities: as when the testator bequeathed the use of property which was leasehold property, and, of course, the use as it stood at the death would be more than the use or income of the value invested: the court, in a number of cases, gave the tenant for life the use as it stood at the death. In the present case, there would be no difference between the use, that is, the income, as it was at the death, and as it would be, invested. The case of *Dewitt v. Schoonmaker* (2 Johns., 243) does not, I think, assume to decide any thing different from the general rule laid down by the chancellor in *Covenhoven v. Shuler* (2 Paige, 122), above cited. In the case in question, the bequest is general, not specific; and, under the authorities cited, I think the money in the hands of the executor should be invested, and the interest only paid to the widow.

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NEW YORK COUNTY—HON. EDWARD C. WEST, SURROGATE—
July, 1860.

BASCOM, TRUSTEE, ETC. v. NICHOLS.

*In the Matter of the Final Accounting of the Executor of
the Last Will, etc., of DAVID NICHOLS, deceased.*

The testator, by his will, directed that in case of his widow's death without issue, a certain sum should be paid over to such five persons, residents of Addison county, Vermont, as should be named and appointed by the judges of the Supreme Court of Vermont, to be trustees, "to found, establish, and manage an institution for the education of females, to be located in the town of Middlebury, Vermont." After certain specific legacies, he bequeathed the residue of his estate "unto the five persons who shall be named as trustees by the Supreme Court of Vermont" for the same purpose. No time was given within which such appointment should be made, and no other mention of the institution, its object, or purpose, was given. The residue consisted of personal property, situated in this State, which was the testator's domicile at the time of his death.

Held, that the bequests were invalid.

The construction and validity of a trust, although for purposes to be carried out in another State, are governed by the laws of the State in which the testator resided at the time of making his will, and at his death.

The rule that the law of domicile governs, applies to the manner and form, conditions and limitations, of the gift, equally with its object.

The will was executed in the State of New York, August 21, 1857, and was proved in the county of New York, April 5, 1858. Letters testamentary were granted on the same day to Lewis B. Brown. At the time of making his will, and at the time of his death, the testator resided, and his personal property was situated, in the State of New York.

It does not appear that the will has been proved in any other State.

The testator, by his will, directed that in case of the death of his wife without issue, "the sum of twenty-five thousand dollars be paid over to such five persons, residents of the county of Addison, in the State of Vermont, as shall be

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named and appointed by the judges of the Supreme Court of the State of Vermont, to be trustees, to found, establish, and manage an institution for the education of females, to be located in the town of Middlebury, in said State of Vermont." And, after certain specific bequests, went on—"All the rest, residue, and remainder of my property and real estate, of whatever kind, and wherever situated, and from whencesoever derived, I give, devise, and bequeath unto the five persons who shall be named and appointed as trustees by the Supreme Court of the State of Vermont, to found and establish an institution for the education of females, to be located in Middlebury aforesaid, and of which mention is hereinbefore made."

On the final accounting of Lewis B. Brown, the executor, William F. Bascom, and four others, residents of Addison county, Vermont, appeared, claiming to be trustees appointed by an order of the Supreme Court of Vermont, made at a term held on the first Tuesday of January, 1860, upon filing a document "purporting to be a copy of the last will and testament of David Nichols;" and also claiming to be trustees under a written *memorandum* of appointment of the six judges of the Supreme Court of Vermont. As such, they claimed the residue of the estate, amounting to \$13,000, for the object of the trust. The claim was contested by the widow and next of kin, on the ground that the trust contained in the will, and the bequest and disposition of \$25,000, after the decease of the wife and of the residuary legatee, were inoperative and void.

DAVID R. JACQUES and CORNELIUS MINOR, for Widow and Next of Kin.

I. The construction and validity of this trust, although for purposes to be carried out in another State, are governed by the laws of New York, in which the testator resided at the time of making his will, and at his death. 1. A gift of personal property in a foreign jurisdiction is no exception to the rule that the law of the domicile governs bequests. (*Story, Conf. Laws*, §§ 38, 101, 479; *Phill. on Domicil*, 16, 19;

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Stanley v. Bernes, 3 *Hagg.*, 373; *Crocker v. Hertford*, 4 *Moore, P. C.*, 358.) 2. A gift of money to be invested in lands in another State is no exception, and trusts declared by a will of such lands are governed by the law of the domicil of the testator. (*Wood v. Wood*, 5 *Paige*, 596; *Hill on Trustees*, 454, 468.) So a gift, to a foreign devisee, of lands in this State, or to a foreign legatee, is governed by the law of New York, in conformity to the rule that the foreign disposition is controlled by the law of the place. (*Banks v. Phelan*, 4 *Barb.*, 88; *Boyce v. City of St. Louis*, 29 *Barb.*, 650, 657; *Story, Conf. Laws*, § 428; *Burge, Col. and For. Law*, 857-8.) 3. Charitable bequests for foreign objects are no exception to this rule. (*Story, Conf. Laws*, § 479; *Eq. Jur.*, § 1184; *Curtis v. Hutton*, 14 *Ves.*, 537; 8 *Simon*, 300; *Phelps v. Phelps*, 28 *Barb.*, 127—affirmed as *Phelps v. Pond*, 23 *N. Y. R.*, 69; *Boyce v. City of St. Louis*, 29 *Barb.*, 653; *Banks v. Phelan*, 4 *Barb.*, 88; *Burr v. Smith*, 7 *Verm.*, 241; *Magill v. Brown*, 1 *Brightly*, 346, n.) 4. The rule that the law of the domicil governs bequests, applies to the manner and form, conditions and limitations, of the gift. A limitation that suspends otherwise than during life, or for more than two lives, being void in New York, will not be sustained when the legatee or object is foreign, although the gift may be for charity. In *Morgan v. Masterton* (4 *Sandf.*, 442), and in *Banks v. Phelan*, there were limitations over to charity after three lives, which were declared void. The result would have been the same had the charities been foreign; as in *Phelps v. Pond*, where the bequest of \$50,000, by a testator residing in New York, for a college in Liberia, was held void by the Court of Appeals, affirming the decision of the general term, on the ground, among others, that there was a suspension of ownership not allowed by the statutes of New York. And in *Magill v. Brown* (1 *Brightly*, 346, n.), gifts by a testatrix domiciled in Pennsylvania to charities in Virginia and other States, were sustained as valid by the law of the domicil. And in *Pres. of U. S. v. Drummond*, *Rolls*, 12 May, 1838, cited in 7 *Cl. & F.*, 155 (the case of the

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Smithsonian bequest), a gift for foreign charity was sustained upon the rule of the law of domicil. 5. There is one qualification to this rule. If a testator disposes of assets situated in a foreign State, and such disposition is against its law or public policy, it will not be sustained, however valid by the law of his domicil. (*Skiff v. Solace*, 23 *Verm.*, 279; *Mathorner v. Hooe*, 9 *Smedes & Marsh.*, 247; *Story, Conf. Laws*, § 38.) In the present case, the assets and the domicil are in the State of New York, and both rules concur; if, therefore, any disposition in the will of David Nichols is invalid by the law or public policy of New York, it is void by the double law of *domicil* and *situs*.

II. This trust is void for indefiniteness and uncertainty. *As to the trustees.* 1. No trustees are named or appointed by the will. 2. The *time* when they are to be appointed is not fixed by the will, nor is it limited to take place within such a period or in such a manner as to prevent a suspension. 3. Neither age, sex, nor qualification (except residence) of trustees is prescribed. They may be infants, and perhaps should be females. 4. There is no provision for their successors, nor "mode of perpetuating and governing" the institution prescribed. 5. It is not only uncertain whether they are to be appointed by the judges individually, or by the court, but whether, if by the judges individually, being persons so designated, the appointment is to be by those in office at the date of the will, or of testator's decease, or of the appointment, whenever made; and if by the court, whether it is by the court exercising its judicial authority or a power of appointment under the will. 6. If acting judicially, can the court proceed *ex parte*, without notice to all parties, and without probate and administration in Vermont? *As to the subject of the trust*, it is uncertain how much of the fund is to be applied to purchase of lands and erection of buildings, and how much to current expenses, "the amount of expenditure and investment necessary to establish and maintain it being wholly undetermined." (*Phelps v. Pond*, *supra*.) A grant or devise to a charitable use, without *interposing a*

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trustee, or to a non-existing corporation, or to an unincorporated society, is *at law* void for want of a person having a sufficient capacity to take. (*Year Books*, 49 Edw. III., 3, 7; 9 Hen. VI., 23, 19, 246; *Fitzh., Dev.*, 2, fol. 284; 4 Edw. III., 3, 7; *Jackson v. Corey*, 8 Johns., 385; *Hornbeck v. Westbrook*, 9 Id., 73; *Atty. G. v. Tancred*, 1 W. Bl., 90; *Baptist Ass. v. Hart*, 4 Wheat., 1; *Com. Dig. Devise, K*; *Story Eq. Jur.*, § 1146; *Hill on Trustees*, 176, 212.) In equity, "in order to give jurisdiction to the Court of Chancery, it is absolutely necessary that there should have been an appointment, or at least an intended appointment of trustees." (*Boyle on Charities*, 237.) It may be said that here the testator, if he has not appointed, has intended an appointment. The will does not authorize or direct the court or judges in Vermont to appoint; it gives to such trustees as they shall appoint: it is a gift, on condition they should appoint; it is a gift to certain persons when they shall be clothed with a certain capacity and character, if the court or judges have the power of appointment, and exercise it. The testator has not, in terms, conferred any such power. It is doubtful if such a power can be conferred upon a court acting judicially. It is plain that the testator has not directed the appointment to be made within a period limited by law. And a court of equity has no power to appoint trustees where none have been named originally, although it may fill vacancies. (*Hill on Trustees*, 176.) In New York, it is now settled, by the decision of the Court of Appeals, that a trust for charity, if a competent trustee "is not named in the first instance," is invalid: an intended appointment is not sufficient. (*Guild of Whitlawyers*, 49 Edw. III., 3, 7; *Owens v. Meth. Missionary Ass.*, 14 N. Y., 381; *Phelps v. Phelps*, 28 Barb., 127—affirmed as *Phelps v. Pond*, 23 N. Y., 69; *Beekman v. Bonsor*, 23 Id., 298; *Chittenden v. Chittenden*, 1 Am. Law Reg., 543.) It is submitted, that while equity will not let a trust fail for want of a trustee, and will, therefore, fill vacancies when they occur, yet it will not supply an original deficiency, and nominate trustees in the first instance.

III. This trust is void for illegality. 1. The design of an institution for education, "founded, established, located, and managed," at Middlebury, Vermont, contemplates and requires the purchase of lands and erection of buildings; there is, therefore, a conversion of the fund into real estate, to the extent required for the purposes of the trust, and the rules and statutes governing trusts of real estate apply. (*Beekman v. People*, 27 Barb., 264; *Giblet v. Hobson*, 8 Myl. & K., 517; *Atty. G. v. Hodgson*, 15 Sim., 146; *Langstaff v. Rennison*, 11 Eng. L. & Eq., 268; *Atty. G. v. Hull*, 9 Hare, 647; *Dunn v. Bonnas*, 1 Kay & Johns., 596; *Tyre v. Corp. Gloucester*, 14 Beav., 173; *Mayor of Feversham v. Ryder*, 5 De G. M. & G., 350.) 2. This trust, being an express trust of real estate to the extent to which there is a conversion, is void, because it is not one of the express trusts authorized by the Revised Statutes, which have abolished all others; and charitable trusts are allowed by statute only in certain specified cases. (3 Rev. Stat., 5 ed., 15, 16, §§ 45, 55; *Story, Eq. Jur.*, § 1152; *Broom's Maxims*, 246-8; 2 *Dwarris on Stat.*, 689; *Sussex Peerage Case*, 11 Cl. & F., 143; 8 Jur., 795; *Yates v. Yates*, 9 Barb., 324; *King v. Rundle*, 15 Id., 144; *Chittenden v. Chittenden*, 1 Law Reg., 543; *McCaughal v. Ryan*, 27 Barb., 377; *Beekman v. People*, 27 Id., 260,—affirmed, 23 N. Y., 298; *Wilson v. Lynt*, 30 Barb., 124; *Downing v. Marshall*, 23 N. Y., 366; *Ayres v. Meth. Epis. Church*, 3 Sandf., 351.) 3. This trust cannot be sustained as a power in trust. (2 Rev. Stat., 4 ed., 140, §§ 58, 59; *Downing v. Marshall*, 23 N. Y., 366.) 4. This trust is void under the restrictions of the statute, upon the suspension of the absolute power of alienation of real estate. (3 Rev. Stat., 5 ed., 11, § 15.) By a uniform series of decisions,—from *Coster v. Lorillard*, 14 Wend., 265, continued by *Hawley v. James*, 16 Id., 61; *Hone's Ex. v. Van Schaick*, 20 Id., 566; *Boymton v. Hoyt*, 1 Den., 53; *Yates v. Yates*, *supra*; *Leonard v. Burr*, 18 N. Y., 96; and many other cases,—the rule is firmly established that the suspension can be effected in no other way than by a designation of lives; and for no other period than

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during two lives. And there is no case in which trusts of real estate for charity are made an exception. In *Williams v. Williams* (8 N. Y., 525), the trust was of personal estate alone, and Judge Denio at the outset of his opinion points out this distinction. The trust being void as a disposition of real estate, the whole must fail; for, although a conversion of the whole fund was not intended, yet the testator has not indicated how much is to be applied either as real or personal estate. (*Shelford on Mort.*, 203; *Beekman v. People*, 27 Barb., 278; *Beekman v. Bonsor*, 23 N. Y., 298; *Chapman v. Brown*, 6 Ves., Jr., 406; *Moggridge v. Thackwell*, 1 Ves., 464; *Atty. G. v. Hinman*, 2 J. & W., 270.) 5. This trust is void, under the restrictions of the statute, upon suspension of the absolute ownership of personal property, and upon accumulations. (*Matter of Howe*, 1 Paige, 214; *Potter v. Chapin*, 6 Id., 639; *Williams v. Williams*, 8 N. Y., 525; *King v. Woodhull*, 3 Edw. Ch., 79; *Sem. of Aub. v. Kellogg*, 16 N. Y., 83; *Wright v. Trustees Meth. Epis. Church*, 1 Hoff. Ch., 202; *Shotwell v. Mott*, 2 Sandf. Ch., 46; *Newcomb v. St. Peter's Church*, Id., 636; *Hornbeck v. Am. Bible Soc.*, Id., 133; *Andrew v. N. Y. Bible Soc.*, 8 N. Y., 559, reversing 4 Sandf., 156; *Banks v. Phelan*, 4 Barb., 80; *Yates v. Yates*, 9 Id., 324; *Chittenden v. Chittenden*, 1 Am. Law Reg., 543; *King v. Rundle*, 15 Barb., 144; *Owens v. Miss. Soc.*, 14 N. Y., 380; *Beekman v. People*, 27 Barb., 260,—affirmed as *Beekman v. Bonsor*, 23 N. Y., 298; *Phelps v. Phelps*, 28 Barb., 127,—affirmed as *Phelps v. Pond*, 23 N. Y., 69; *Downing v. Marshall*, Id., 366; *Morgan v. Masterton*, 4 Sandf. R., 440.)

STARR & RUGGLES, for the Trustees, claimants of the residuary fund.

I. The bequests are valid charitable bequests. (1.) The rule is, that the intention of the testator is to be carried out, if consistent with the rules of law. (3 Rev. Stat., 5 ed., 38.) In this case, the intention of the testator is clearly manifest. The bequests have a charitable intent or purpose, viz., the advancement of learning. (*Vidal v. Girard*, 2 How. U. S.,

191, 192; *Owens v. Missionary Society*, 14 *N. Y.* [4 *Kern.*], 380.) (2.) The object is defined with sufficient certainty, "to found, establish, and manage an institution for the education of females, to be located in the town of Middlebury, in the State of Vermont." The trust, as set forth, is of so tangible a nature, that the Court can deal with it. (*Ommanney v. Butcher*, 1 *Turner & R.*, 260.) And is sufficiently certain to be intelligible. (2 *Story Eq.*, ed. 1861, § 1154, d.) The object is as fully and definitely set out in this will as it has been in many others which have been questioned on the ground of uncertainty, and held good,—as bequests to the "poor of a parish," to the "poor of Sunbury," "to the inhabitants and parishioners," &c., &c. (*Lewin on Trusts*, 142, 143; *Whicker v. Hume*, 13 *Beav.*, 366.) (3.) The subject, *i. e.*, the portion of the estate bequeathed, is ascertained to a cent. In the second item it is \$25,000, and the "residue" \$13,555.77. (4.) There are trustees competent to take. The testator has provided for their appointment, and this court is asked merely to order the funds in the hands of the executor to be paid over to parties who stand ready to take them, and who are, by the will, made the almoners of the testator's bounty. There is the authority to appoint, and the appointment has been made. (*Shotwell v. Mott*, 2 *Sandf. Ch.*, 46; *Beekman v. Bonsor*, 23 *N. Y.*, 298, 308, 309; *Williams v. Williams*, 8 *N. Y.* [4 *Seld.*], 525.)

II. There is no suspension of the absolute ownership of the property, and the bequest of the residue is given by words, "*de presenti*," and not upon any limitation or condition expressed in the will. At any moment the court of Vermont could appoint. The property bequeathed is personal property. Upon the death of the testator it goes to the executor, and the testator has provided for the appointment of trustees, to whom the residue is to be paid. (1.) The idea of the Supreme Court of Vermont not appointing trustees never occurred to him, and a court of equity will consider them appointed. The trustees take directly from the will; and it is the same as though they had been named in the will.

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(2.) Where a party takes by execution of a power, he takes under the authority of the power, equally as if the power and the instrument executing the power were incorporated in one deed. (*Doolittle v. Lewis*, 7 Johns. Ch., 45.) (3.) The law does not require, to make a devise or legacy valid, that the party should be designated by his name of baptism or surname. (*Inglis v. Sailors' Snug Harbor*, 3 Peters' U. S., 99, 146.)

III. The bequests being for charitable uses, the statute relative to uses and trusts, and against perpetuities, does not apply. (*Shotwell v. Mott*, 2 Sandf. Ch., 46; *Williams v. Williams*, 8 N. Y. [4 Seld.], 541.)

IV. The trusts being for charitable purposes,—to be executed in the State of Vermont by persons there—if they are not in violation of any law of that State, must be supported. (14 Ves., 540; *Oliphant v. Hendrie*, 1 Broch., 571; *Att. G. v. Stewart*, 2 Meriv., 156; 2 Maddock's Ch., Pr., 61.)

V. By the existing law of the State of Vermont, the trust is valid, and the Court of Chancery possesses, and will exercise, the necessary powers to execute the trust. (*Burr v. Smith*, 7 Verm., 241.)

ALEXANDER W. BRADFORD, for the Executor.

THE SURROGATE decided that the residuary clause in the will was invalid, but did not state on what grounds; and ordered that the residuary fund, after deducting the costs of this proceeding, be distributed among the widow and next of kin. And it was further ordered and adjudged, that the bequest and disposition of the sum of twenty-five thousand dollars, after the death of the widow, Caroline B. Nichols, in default of issue, given to the same purpose as the residuary estate, was inoperative and void; and that upon her death, the said sum of twenty-five thousand dollars should be distributed in accordance with the statutes of the State of New York.

An appeal from the decision and decree of the Surrogate was taken to the general term of the Supreme Court. Pres-

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ent, HON. D. P. INGRAHAM, P. J., and HON. WILLIAM H. LEONARD, and HON. GEORGE G. BARNARD, JJ.

The surrogate's decree was affirmed, without argument, no written opinion being rendered; but Justice INGRAHAM being understood to remark, that, in his opinion, the neglect of the testator to fix the time for the appointment of the trustees by the Vermont Supreme Court, was sufficient to invalidate the bequest; and that the case was within the previous ruling of the Supreme Court and the Court of Appeals, in respect to the provisions of the will of Anson G. Phelps for the establishment of a college in Liberia.

NEW YORK COUNTY—HON. EDWARD C. WEST, SURROGATE—December, 1860.

MORRELL v. SIMMONS.

In the Matter of the Distribution of the Estate of WILLIAM H. SIMMONS, deceased.

The testator bequeathed \$500 to his sister, A. L., "to be received, or the interest thereof, as I have hereinafter designated;" but did not, in any manner, designate his further intention in regard to the bequest, but appointed a trustee for her. The remainder of the estate was directed to be divided among four other legatees, who should "share equally and alike, and enjoy the benefits and emoluments resulting therefrom;" and a trustee was appointed for one of these last legatees, who was a minor.

Held, that no trust was created by the will, and that the several legatees were entitled to be paid, on the distribution, the *principal* of the estate as well as the income.

The gift is absolute. The four legatees are tenants in common, under the gift of "the benefits and emoluments," to use the principal and interest; except that on the death of one, the remainder of his share unused goes to the survivors.

The testator, William H. Simmons, by his will bequeathed to his sister, Adelaide L. Simmons, "the sum of five hundred dollars, to be received, or the interest thereof, as I have here-

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inafter designated. The remainder of my estate to be divided as follows: that my brother, Floyd F. Simmons, and my sisters, Mary R. Simmons, Sophia A. Simmons, and Emma J. Simmons, shall share equally and alike, and enjoy the benefits and emoluments resulting therefrom. Should either of the above legatees de cease, leaving no issue, then the shares, or parts of shares, so left, shall be equally divided among the surviving heirs." A trustee is appointed for Adelaide L., and another for Mary R., a minor, named as legatee.

On the petition of John H. Morrell, one of the executors, for a final settlement of his accounts, it was claimed, on his part, that Adelaide L. Simmons was only entitled during her life to the income of the legacy in her favor, of \$500, and that on her death, the same should fall into and form a part of the residuary estate; and that the other four legatees should each take a life interest in one-quarter of the residuary portion of the estate; and that on the death of either, leaving issue, the share should be paid to such issue; and if without issue, then to the survivors of the legatees and distributees, share and share alike, including Adelaide, and the issue of such as might be dead. The legatees claimed that they were entitled to the principal of the estate as well as the income.

PLATT, GERARD & BUCKLEY, for the Executor.

I. The obvious intent of the testator was to give the beneficiaries named in the will, only life interests in the various portions bequeathed to them. That is to say, that Adelaide L. should receive only the income of \$500, and that on her death, that sum should fall into the residuary estate. As to the remainder, the other four legatees should each take life interests in one-fourth of the fund, with remainder over to their issue respectively; and in case of the death of either, his or her share to be paid to the heirs, in which Adelaide should share. This interest they would then take absolutely. But the limitation over is valid, and the legatees in the will only take a life estate. (*Norris v. Beye*, 13 N. Y. [3

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Kern.], 273; reversing *S. U.*, 15 *Barb.*, 416.) The fact that the testator appointed a trustee of Adelaide L., indicates the intent of the testator that she should receive the *interest* only. Again, the testator makes Robert N. Kitching the trustee for Mary R.; but he cannot be a trustee unless she has a life estate.

II. By 3 *Rev. Stat.*, 5 ed., 12, § 22, a remainder to take effect on *dying without issue*, means issue at the death of the person named as ancestor—that is, the first legatee; and 3 *Rev. Stat.*, 5 ed., 75, § 2, says limitations of future interests in personal property shall be subject to the rules prescribed in relation to future estates in land. See *Norris v. Beye* (13 *N. Y.* [3 *Kern.*], 273), showing that the *time* is altered by our statute to the death of the first taker, and the bequest over is valid.

III. The whole estate should be converted into money and invested in permanent securities, and the income paid over to the persons entitled to a life estate. (*Howe v. Earl of Dartmouth*, 7 *Ves.*, 137; *Fearns v. Young*, 9 *Id.*, 549; *Dayton on Surrogates*, 417.)

C. MINOR and DAVID R. JACQUES, for the Legatees.

I. The bequest of \$500 to Adelaide, is an absolute gift of that sum to her. The words "to be received, or the interest thereof, as I have hereinafter designated," do not create a trust or limit the gift to income: because, 1. There is no indication of the trusts intended, nor designation of the manner in which the interest is to be received, in any other part of the will. 2. No paper naming trustees or appointing trusts, unless executed as a will, is valid, and no such paper is annexed to the will. (*Thompson v. Quimby*, 2 *Bradf.*, 449.) 3. There is no gift or limitation over of this bequest; and in such cases, a gift of income is a gift of the principal. (*Pinckney v. Pinckney*, 1 *Bradf.*, 270.) 4. If this were a gift of interest only, or a gift for life only, which it is not, yet as there is no remainder over, it is absolute. (2 *Roper*, 1519; 2 *Kent's Com.*, 352.)

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II. The testator directs that the remainder of his estate be divided among his brother and three sisters, omitting Adelaide to whom the gift of \$500 is made, "share and share alike, to enjoy the benefits and emoluments resulting therefrom. Should either of the above legatees decease leaving no issue, then the shares or parts of shares so left shall be equally divided among the surviving heirs." 1. If the testator intended that the four legatees should receive only the interest and income, and that on the death of either, the share of the income of the one so dying go to the survivors of the four residuary legatees, the principal of the fund being kept entire, then there is a suspension during more than two lives, and a perpetuity forbidden by the statute. (2 *Rev. Stat.*, ch. iv., tit. 4, § 1.) 2. But if this bequest is not of the whole to the four jointly, but of one-fourth to each, the words "share equally and alike" effecting a separate gift, then each of the four takes a several and vested legacy. The words "*benefits and emoluments*" do not mean interest and income any more than principal, and are as appropriate in reference to the use and enjoyment of principal as to interest. (*Hart v. Marks*, 4 *Bradf.*, 161.)

III. The testator not only directs that the whole residue be divided among the four persons named, so that they shall enjoy its "benefits and emoluments" equally, but provides that if either dies without issue, any "*parts of shares*" left shall go to surviving heirs; which shows conclusively that he intended that the legatees should take the principal as well as income, and that only unspent principal should pass to the heirs.

IV. As the remainder over is only of such "parts of shares" as are left, each legatee is at liberty to use and consume the whole, and the gift is absolute. (*Pinckney v. Pinckney*, 1 *Bradf.*, 269; *Bradley v. Peizoto*, 3 *Ves.*, 324; *Ross v. Ross*, 1 *Jac. & W.*, 154; *Jackson v. Bull*, 10 *Johns.*, 19.)

V. The testator seems to have designed annexing to his will a paper writing authorizing trustees to act, one for Adelaide and one for Mary, who is one of the four residuary leg-

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atees; but no such paper is found annexed. The testator may have designed indicating the manner in which the principal and income of Mary's and Adelaide's bequest be spent and applied; but a clause naming trustees, and referring to the authorities for them to act "as annexed," is void for uncertainty. The trustees are named, but the trusts are not declared. The authority not being annexed, it is presumed the testator abandoned his intention to appoint, and it is impossible for the trustees named to act, as no trusts are designated.

VI. The residuary bequest admits of but one of two constructions. The testator, either (1) by the gift of the benefits and emoluments to be shared equally and alike, and of the share of those benefits, of any one dying without issue, to the survivors, intended to give the four legatees the income, only the principal meanwhile remaining in the hands of the executors, and the income of each share going, on the death of either, to the survivors; in which case there is evidently a suspension of the absolute ownership during three lives, and the bequest is void as involving a perpetuity: or else, (2) the four legatees are tenants in common, each of one-fourth, which is a vested legacy with right, under the gift of all the benefits and emoluments, to use the principal and interest; with the single qualification, that if any part of a share remains unused, it shall go, in default of issue, to survivors. The gift is absolute.

THE SURROGATE.—The legatees are entitled, on the distribution, to the principal of the estate of the testator, as well as to the income.

GILMAN v. GILMAN.

NEW YORK COUNTY—HON. EDWARD C. WEST, SURROGATE—May, 1861.

GILMAN v. GILMAN.

*In the Matter of proving the Last Will and Testament of
NATHANIEL GILMAN, deceased.*

The desk whereat the testator and one of the subscribing witnesses sat when the testator subscribed the will, and the witness signed, was separated from the desks where the two other witnesses sat by a brick wall or column, four feet broad; but it did not appear that their positions rendered their seeing the testator impossible, or that the two compartments were considered as separate offices. The witness who had already subscribed requested the two other witnesses to witness the will, at the request and in the hearing of the testator, in the words: "Mr. Gilman (the testator) requests you to witness his will." The instrument (already signed by the testator, and attested by one of the witnesses) was then signed by the two other witnesses, in the presence of, but without any further request or declaration by, the testator.

Held, 1. That the witnesses all signed substantially in the presence of each other, and in the presence of the testator, within the meaning of the statute.

2. That the intent to execute his last will was thereby published and declared, and was also acknowledged by the testator, and the witnesses were by him requested to become attesting witnesses.

The will and the codicil were written on one side of the page of several sheets, which were folded and tied together in the form of a book, leaving alternate pages blank. The codicil following the will, ended at the bottom of a page, where the testator signed his name, leaving no room for the attestation clause and signatures of the witnesses. To carry out the method of writing only on one side of each sheet, the attestation clause and subscription of the witnesses were written on the second page after the testator's signature, leaving an entire blank page between them.

Held, That this was a subscription "at the end" within the meaning of the statute.

An instrument is signed at the end, when nothing intervenes between the instrument and the subscription.

The fact that the testator died in another State, where proceedings were taken and letters testamentary granted, before any proceedings were had on the will here, does not prevent the surrogate having jurisdiction to prove the will, where assets are shown to be here. The offer to show that the testator was a non-resident and a non-inhabitant of this State, refused.

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The Surrogate's Court is always open. The absence of the surrogate, or of the parties, on an adjourned day, does not abate the proceedings or put the case out of court.

On the petition of George F. Gilman, claiming to be an executor named in the last will and testament of Nathaniel Gilman, deceased, a citation was issued to the widow, heirs, and next of kin, to have the will proved.

The instrument propounded bore date April 10, 1858, and was alleged to have been executed in the city of New York, in the presence of William Miles, Samuel Hurley, and Alex. C. Collins, as attesting witnesses. The paper propounded for probate as a codicil to the will, bore date the day of decedent's death, December 19, 1859, and was executed at Waterville, Me. Neither the attestation clause of the will, nor that of the codicil, declare that the subscription of the testator was made in the presence of the witnesses, or was acknowledged by him to them.

The will was subscribed and witnessed at the office of Hurley & Miles, 80 Gold-street. Between the desk at which the testator sat, and the desk at which the witnesses Collins and Hurley sat, there was an upright wall or column of brick, about four feet wide, partially hiding them from each other. Miles was sitting with the testator; and the testator having subscribed his name, and Miles attesting as a witness, the latter called to Hurley and Collins, saying that "Mr. Gilman wanted them to witness his will." Hurley and Collins came in and subscribed their names. It did not appear that the testator said any thing to them about the will. But it did appear that Miles had told them before that they would be called upon to witness Mr. Gilman's will. It was contended that this was not a subscription in the presence of the testator, and that there was no publication of the will.

The will and codicil were written on only one side of several sheets, which were folded and tied together in the form of a book, thus leaving alternate blank pages. At the bottom of the last page of the codicil, there was not space for the attestation clause and subscription of the wit-

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nesses. The attestation clause and subscription of the witnesses were written on the second page following, thus leaving an entire blank page between the codicil and the subscription.

It was contended, on the part of the contestants, that this was not a subscription "at the end," within the meaning of the statute.

JAMES M. SMITH *on behalf of Anna K. Gilman, executrix, and Charles B. Gilman, one of the executors,*

objected, on the return of the citation, to the proof of the will, on the ground that the testator was not an inhabitant of this State, and did not die in this State, but was an inhabitant of Maine, and died at Waterville, in that State; and that the will was taken from that State and brought here for probate, without the consent of the executrix and the widow. And also on the further ground, that proceedings had been taken in the State of Maine, before any proceedings were had before the surrogate of the county of New York, before a court having competent jurisdiction in the State of Maine, and letters testamentary granted. Mr. Smith offered to show that the testator was a non-resident of the State of New York, and was a resident and inhabitant of Waterville, in the State of Maine, at the time of his decease, and also that letters of administration had been granted on the estate before these proceedings were taken; and claimed the right to show it before any further proceedings were taken.

ALEXANDER W. BRADFORD, *for special Guardian of Minors.*

The surrogate has jurisdiction to prove the will, independently of the question of domicile, for the reason that there are assets here. Though the statute authorizes probate here on the production of a foreign probate, when the testator's domicile was out of the State, that provision is in addition to the ordinary jurisdiction of the surrogate, and not in exclusion of his power to grant original probate. The foreign probate has no force in respect to real estate in this State.

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THE SURROGATE.—The objection and offer on the part of the contestants are overruled.

The hearing of testimony as to the due execution of the will was had from time to time, up to December 20, 1860, shortly after which the surrogate went to the South, on account of his health, and the hearing was adjourned to the 8th of March, 1861. On that day, the counsel for the contestants attended, but no one appeared for the proponents, and the surrogate's clerk adjourned the hearing to May 24th, 1861. On the adjourned day the surrogate appeared.

WILLIAM TRACY, for the Contestants,

objected to going on with the case, on the ground that the case was out of court; and read his own affidavit, that on the 8th of March, he attended at the Surrogate's Court; that no counsel were present on the part of the proponents; that the surrogate was absent, not to return before April; and that Mr. Van Cott, the surrogate's principal clerk, entered an order, without consent of counsel, adjourning the cause. (*Willard*, 35, 432; 2 *Rev. Stat.*, 4 ed., 94, § 64, 421.)

MR. BRADFORD, in reply.

1. To derive any benefit from the objection, there should have been a motion to vacate or rescind the order of adjournment, or an appeal should have been taken from the order itself. 2. The Surrogate's Court is always open. In this respect, its capacity exceeds that of all other courts, which have their terms or limits of session. (2 *Rev. Stat.*, 221, § 2.) 3. This extraordinary provision was designed for the purpose of excluding technical objections. For the same reason, no rules of practice or pleading were prescribed. When the case is brought within the jurisdiction of the court, it is competent, "at all times," to have "a hearing." 4. If the surrogate be absent, or the office be vacant, a substitute is provided. (2 *Rev. Stat.*, 79.) 5. But the statute specially provides that whenever the county court, &c., "or

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any Surrogate's Court, appointed to be held in any county, shall fail, no writ, process, recognizance, or other proceeding, returnable at, or to be heard or tried in said court, shall be abated, discontinued, or rendered void thereby." (*Laws of 1847*, ch. 280, § 28; 3 *Rev. Stat.*, 5 ed., 305, § 24.)

THE SURROGATE.—The objection must be overruled.

CHARLES H. GLOVER, *for the Contestants.*

I. None of the statutory requirements in respect to the execution of the will were complied with. The testator did not subscribe the will in the presence of the witnesses; nor acknowledge the subscription to them; nor "declare the instrument so subscribed to be his last will and testament;" nor did they sign their names as witnesses at his request. The subscribing witness, Miles, expresses doubt whether the will was subscribed by the decedent before or after Hurley and Collins, the other witnesses, left the desk. Hurley is positive, that when he came to the table, the will already had Gilman's signature, and Collins came to the table after Hurley. The will was not subscribed, then, in the presence either of Hurley or of Collins, unless their situation at the desk constituted such presence, within the meaning of the statute. It did not constitute such presence. Hurley, the senior partner, and Collins, the book-keeper, in the offices where the will was signed, were standing at their counting-room desk. Hurley was some fifteen feet from decedent, with his back towards him, and between him and decedent was the brick wall, four feet wide. It is impossible that he should have seen the decedent subscribe the will. Collins was at the other side of the desk. He was, therefore, some twenty feet from the decedent, and between him and decedent were Hurley, the brick wall, and Miles, who was sitting with the testator. It is evident that he could not have seen decedent sign, unless he left his position and walked two or three steps towards one of the openings. The affirmative was with the proponents, and they did not offer any evidence that

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Collins did not change his position. And the failure of Collins to recollect any thing of the transaction, shows that it did not excite his curiosity or attract his attention. The language employed by the witnesses in speaking of the offices, shows that they habitually recognized a virtual separation between them.

II. What is the meaning of the words "*in the presence of*," as employed in the statute? 1. The Statute of Frauds required the *witnesses* to a will of lands, to attest it in the presence of the *testator*. The current of authorities has interpreted the meaning of the phrase in this latter statute as follows. If the testator and the witnesses were in the same room, that was ordinarily sufficient; unless the will was signed by the witnesses clandestinely, in a corner. (*Longford v. Eyre*, 1 P. Wms., 740.) Or the testator was mentally incapable of recognizing the presence of the witnesses. (*Right v. Price*, 1 Doug., 241.) Or, by reason of physical weakness, was unable to put himself in a position from which he could see them. (*Neil v. Niel*, 1 Leigh., 6.) Or there was a physical obstruction between testator and the witnesses, which prevented him from seeing them without changing his position. (*Brooks v. Duffell*, 23 Geo., 441.) But if the testator and the witnesses were in different rooms, the evidence must show affirmatively that the testator could have seen them subscribe without changing his position. (*Wright v. Manifold*, 1 M. & S., 294; *In re Colman*, 3 Curt., 118; *Todd v. Winchelsea*, 1 Moody & Malkin, 12; 2 C. & P., 488; *Winchelsea v. Wauchope*, 3 Russ. Ch., 441; *Clerk v. Ward*, 4 Brown's Ca. in P., 71; *Graham v. Graham*, 10 Iredell, (N. C.) 219; *Jones v. Tuck*, 3 Jones (N. C.), 202.) And since the new Statute of Wills, the English courts interpret the words with still greater strictness. (*Tribe v. Tribe*, 13 Jur., 793; 1 Rob. Ecc. R., 775; *Norton v. Bazett*, 3 Jur. [N. S.], 1084.) If these rules of interpretation are applied to this case, it must be decided that the testator did not subscribe in the presence of Hurley and Collins. 2. But it is submitted that the words, as used in our statute, should be inter-

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preted more strictly than like words in the Statute of Frauds. Our statute was passed to prevent the mischiefs which had resulted from the lax interpretation of the Statute of Frauds. Its words should, therefore, be construed with greater strictness than like words in the old statute. (*Remsen v. Brinkerhoff*, 26 Wend., 325; *Seymour v. Van Wyck*, 2 Seld., 120; *Chaffee v. Baptist Miss. Con.*, 10 Paige, 85; *Lewis v. Lewis*, 13 Barb., 17; 1 Kern., 220; *Tonnele v. Hall*, 4 Comst., 140; *Whitbeck v. Patterson*, 10 Barb., 608; 4 Kent, 515; *Dewey v. Dewey*, 1 Metc., 349; *Seguine v. Seguine*, 2 Barb., 385.)

III. The codicil was not duly executed, as the witnesses did not sign their names "at the end," as required by the statute. The provision of the statute requiring such a subscription was intended—1. To protect the testator against the interpolation of fraudulent additions to the will between the end of it and the signatures of the witnesses. (*M'Guire v. Kerr*, 2 Bradf., 244.) 2. To protect the heir against the interpolation, by the testator himself, of new testamentary provisions after the final execution of the will. (*Smee v. Bryer*, 1 Rob. Ecc. R., 616; *Ayres v. Ayres*, Id., 466; In re *John Searlett*, 4 Notes of Cases, 480.) In the present case, the object of the statute might easily be defeated. Without taking the blank left-hand page into consideration, the intervening blank space is amply sufficient for the purpose mentioned. Had the testator, after the departure of the witnesses, chosen to insert a new codicil, between the end of the codicil now propounded and the attestation clause, such new codicil must, upon the evidence in the case, have been admitted to probate.

ALEXANDER W. BRADFORD, for Proponent.

The codicil was duly executed. 1. There was no room to attest on the last page of the codicil, and it was necessary to turn the page over. 2. But the testator having adopted the mode of writing on a single page of a sheet, leaving the alternate page blank, the attestation, according to the same plan, was on the proper page. All the sheets being bound

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together, and no testamentary provision or writing, except the attestation clause, appearing between the end of the codicil, the testator's subscription, and the subscription of the witnesses, they substantially complied with the statute, and subscribed at the end of the codicil. In England, wills are commonly written in solicitors' offices, on the alternate sides of the paper. (*Case of Batten*, 2 Rob., 125; *Case of Baully*, 1 Id., 643.) In *Baully's Case* the first page was filled, the second left blank, and the signature placed at the top of the third page. Sir H. J. Fust said: "If the signature is not valid, I know not where it could have been placed. I decree probate." The connection of the several sheets of a will may be partly inferred from the sense. (*Marsh v. Murray*, *Law Jour.*, 1861, 77.) 3. The act of 1 Victoria required the will to be signed at the foot or end thereof. (16 *Lond. Jur.*, 1852, part 2, 4181; *Law Jour.*, 1859, part 3, 14.) At first the court inclined to a very liberal interpretation of the statute. (*Woodington's Case*, 2 Curt., 324; *Carver's Case*, 3 Id., 29; *Powell's Case*, 1 Rob. Ecc. R., 421; *Jones' Case*, 1 Rob., 424; *Gunning's Case*, Id., 459.) After this the court grew more strict. The leading cases are *Ayres v. Ayres* (1 Rob., 466); *Willis v. Lowe* (Id., 618, note); *Smee v. Bryer* (1 Id., 619.) In *Willis v. Lowe*, the will was written on a sheet of letter-paper, measuring in height $9\frac{1}{16}$ inches. The first page was completely covered with writing. The writing on the second page commenced at the top, and ended at a distance of $5\frac{1}{8}$ inches. The remainder of the second page was blank, measuring $3\frac{5}{16}$ inches, a sufficient space for the signature of the testatrix, as well as for the attestation clause, with the names of the witnesses; a space of two inches from the top of the third page was blank, and then followed the attestation clause, with the signature of the testatrix and witnesses. The will held not to be signed at the foot or end. In *Ayres v. Ayres*, the will ended on the first sheet, three lines above the end. Rather more than half the next page was left blank. Then came the attestation clause, and after that the names of testator and witnesses. There were many altera-

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tions and obliterations, not noted, on the first page. There was no disposition of the residue. Two of the three attesting witnesses, one being dead, swore that, "save as to the testator's signature, they took no notice whatever of the said paper, and that no person besides themselves and the said James Wall (dead) was present with the deceased at the time of the execution." In *Smee v. Bryer*, there was a space of $\frac{1}{10}$ of an inch at the end of the will on the third page, where the signature of the testatrix might have been "squeezed in." It was, however, placed far down the fourth page. On the fourth side there was a memorandum of attestation, together with the names of two witnesses to an interlineation: half way down commenced a long attestation clause, occupying half the width of the page: opposite the third line of the attestation clause to the right, was the signature. The signature was more than four inches below the memorandum of interlineation. The court said that the paper was not signed "at the foot or end," and that in future it would adhere more closely to the words of the statute. The case went to the Privy Council, who sustained the decision, but refused to lay down any principle to govern future cases. They suggest that common sense should govern. In *Corder's Case* (1 Rob., 669), two inches of the last line of first page were blank, and under that a blank of one inch and $\frac{1}{10}$; the second page was wholly blank; the third commenced with a testimonium clause, including a revocation of all former wills, and the signature of the testatrix was written one inch $\frac{1}{10}$ below that clause;—*held*, to be signed at the foot or end. The Wills Act does *not* require a will to be written continuously. In *Howell's Case* (1 Rob., 671), one and $\frac{1}{10}$ inches left blank on the last line of the first page, and one inch and $\frac{1}{10}$ below, and the signature of the testatrix on the second page, opposite to the third line of the attestation clause. The will was rejected with reluctance. *Ensell's Case* (1 Rob., 702): Blank on last line of one inch and $\frac{1}{10}$, then below a blank of $\frac{1}{10}$ of an inch, and the signature of testator $\frac{1}{10}$ of an inch below the top of the second page.

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Will rejected with reluctance, in order that it might go to the judiciary committee. In *Harris's Case* (1 Rob., 703), $\frac{1}{10}$ of an inch between the testimonium and the attestation, $\frac{1}{10}$ between the attestation and signature. The will allowed. In *Brown's Case* (1 Rob., 710), $\frac{1}{10}$ of an inch on second page, between the dispositive part and the third page; then attestation clause on the third page; then a blank of $\frac{1}{10}$ of an inch; then the signature of attesting witnesses; then blank of $\frac{1}{10}$ of an inch; then the signature of testator. *Held*, properly signed. In *Beadon's Case* (2 Rob., 139), where $2\frac{3}{8}$ inches were left between the testimonium clause and the signature, *the will was rejected*. In *Dawney's Case* (2 Rob., 178), the signature was one and $\frac{1}{10}$ of an inch below the attestation clause. The will was sustained. In *Hearn's Case* (2 Rob., 112), one inch and $\frac{1}{10}$ lay between the testimonium and the attestation clause. The testimonium was imperfect, and the signature was nearly three inches below the testimonium, opposite the fourth line of the attestation clause. The will was rejected. In *Holbech v. Holbech* (2 Rob., 126), there was a blank of three and $\frac{1}{10}$ inches at the foot of the second page, and two and $\frac{1}{10}$ on the third. Then came the signature. The will was rejected. In *Howell's Case* (2 Rob., 197), four and $\frac{1}{2}$ inches were blank, and the will filled with erasures. It was rejected. In *Holland's Case* (2 Rob., 196), though a considerable blank was left ($1\frac{6}{10}$ inches) between the testimonium and the attestation, yet a large part of the will being above the signature, in the same page, it was sustained. In *Prentice's Case* (2 Rob., 182), one inch and $\frac{1}{10}$ was blank; the will was admitted. In *Welsh's Case* (2 Rob., 179), $\frac{1}{10}$ of an inch was blank between the attestation and the testimonium, the testator's signature two inches and $\frac{1}{10}$ below the last line of the will. Probate was allowed. In *Shadwell's Case* (2 Rob., 140), a barrister-at-law made a will on note-paper, leaving a blank of one inch and $\frac{1}{2}$ at the foot of the second page. On the third he placed a short testimonium, and then his signature. *Held*, that it should have been signed on the second page. The will was rejected. In *Rowe's Case*

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(2 Rob., 199), $4\frac{3}{16}$ inches were left blank on the last line; with $\frac{3}{16}$ of an inch space below it: the signature was placed $2\frac{3}{16}$ inches from top of next page. *Held*, not duly executed. In *White's Case* (2 Rob., 194), the principle was laid down, that where a part of the will was above the signature on the same page, there was a reasonable compliance with the statute. In *Helling's Case* (1 Rob., 753), four inches were left blank on third page, yet, testatrix being blind, the will was allowed. *Wood's Case* (2 Rob., 180), was of the same general tenor. Small blanks were overlooked, and probate was allowed.

THE SURROGATE decided that the instrument offered for probate was the last will and testament, and codicil thereto of the said testator, and as such was valid as a will of real and personal estate; and the same was admitted* to probate as a will of real and personal estate.

An appeal from the decree of the surrogate admitting the will, was taken by the contestants to the Supreme Court, where an affirmance was had, with an opinion by LEONARD, J.*

BY THE COURT.—LEONARD, J.—I. The will in question was well executed. The testator and the witnesses were all in the same room at the moment the attestation was signed. The witnesses all signed, substantially, in the presence of each other, as well as in the actual presence of the testator, within the meaning of the statute.

So far as the witness Miles is concerned, the will was actually signed in his presence. Miles, at the request of the testator, and in his hearing, requested the two other witnesses, Hurley and Collins, then present in the same room, to witness the will in these words: "Mr. Gilman requests you to witness his will." The instrument was then produced, already signed by the testator, and in his presence signed by Hurley and Collins as witnesses. The testator had pre-

* SUPREME COURT, *General Term, November, 1863.* Present, INGRAHAM, LEONARD, and BARNARD, JJ.

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vously requested Miles to have these persons present to witness the execution of his will, and to be present himself.

The testator understood the business which was then being transacted. He made no objection to the declaration or request made by Miles in his presence and hearing, but proceeded to consummate the business for which he came there, the execution and attestation of his will. The intent to execute his last will was thereby published and declared, and was also acknowledged by the testator, and the witnesses were by him requested to become attesting witnesses.

II. The codicil is also well executed. An instrument is signed at the end, when nothing intervenes between the instrument and the subscription.

Who shall undertake, judicially, to say that the subscription shall be one-eighth of an inch, one-half an inch, two inches, or ten inches from the last line of the instrument? The distance from the last line has not been fixed by statute. The place named in the statute is the end. The end of an instrument in writing commences and continues until something else or some other writing occurs.

These principles are, I think, in conformity with the spirit of the decisions in this State in respect to the execution of testamentary instruments.

III. The decree of the surrogate, admitting the will to probate, determines only the sufficiency of its execution. In respect to this question, the domicile of the testator is unimportant in this case.

JEFFERSON COUNTY—HON. MILTON H. MERWIN, SURROGATE—February, 1861.

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*In the Matter of proving the Last Will and Testament of
HENRY J. VAN HOOSER, deceased.*

Where one of the subscribing witnesses, in the presence of the other, asked the testator if the name at the end of the instrument, pointing to it, was

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his signature, and the testator replied that it was,—*Held*, sufficient as a subscription in the presence of both witnesses.

The testator, in the presence of both witnesses, held the instrument open in his hand, and said to one of the witnesses, "I want you to witness my will," which the witness did; and then said to the other witness, "I want you to witness it too," which the other witness did. *Held*, sufficient as a publication.

The witness must be informed by some unequivocal act or word of the testator that the instrument which the testator has subscribed is his last will and testament. If this is done, it is a substantial compliance with the statute; and nothing less than this will do.

This was an application for the proof of the will of Henry J. Van Hooser, deceased. The widow presented it for probate, and it was contested by some of the heirs. The facts are fully stated in the opinion.

HUBBARD & LANSING, *for Petitioner.*

W. C. THOMPSON, *for Contestants.*

S. D. BARR, *Guardian for Minors.*

THE SURROGATE.—Section 35 of 3 *Rev. Stat.*, 5 ed., 144, provides that a will shall be executed and attested as follows:

I. It shall be subscribed by the testator at the end of the will.

II. Such subscription shall be made by the testator in the presence of each of the attesting witnesses, or shall be acknowledged by him to have been so made to each of the attesting witnesses.

III. The testator, at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament.

IV. There shall be at least two attesting witnesses, each of whom shall sign his name as witness at the end of the will, at the request of the testator.

It is not disputed that the first and fourth requisites are complied with, but objection is raised that the *second* and *third* requisites are not complied with. The evidence as to the second requisite is as follows:

The attesting clause recites that the will was subscribed by

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the testator in the presence of the witnesses. James C. Douglas, one of the subscribing witnesses, on his direct examination, says: "I cannot tell positive whether Mr. Van Hooser subscribed his name in my presence; I cannot say that I saw V. H. sign it: he said it was his will in the presence of father and myself—both were there. I think he signed it at the same time." On cross-examination, in answer to the question, Did you hear V. H. say that the name purporting to be his to that paper was his signature, this witness said: "I can't swear positive, but think he did say so."

The witness, James Douglas, says: "I can't say whether I saw V. H. sign it." On cross-examination, he says: "I don't recollect that I saw V. H. write any thing then; don't recollect whether his name was there, or whether he put it down then. It was there when I signed the will. I asked him if that was his name there, if he put it there with his free will and accord, and he said yes. This was at the time I signed as witness, and after I took the pen."

The evidence as to the *third* requisite is as follows: James C. Douglas testifies: While in the room, "V. H. asked me to be a witness to his will. I told him, if it was his request, I would do it. I thereupon signed the paper shown me (the will). He might have read over the paper to me, but can't say he did. He said it was his will, in presence of father and myself." On cross-examination he said: "It was after this (that is, after the request to witness to sign), that he said to father, You will sign it too. I can't say that he mentioned the word *will*, only when he asked me to sign as witness; or called the paper his will at any other time. I think he then turned round to my father, and said he wanted him to sign it too. When V. H. wanted me to sign his will, he held the paper in his hands: think it was open; and I can't say he said any thing more until I signed it." James Douglas says: "Testator said to me, You wanted I should witness your will; now I want you should witness mine. I did; that is my name to the paper. This is the instrument he showed me as his will and requested me to sign—all there, when he said it was

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his will." On cross-examination this witness says: "I heard him ask James C. to witness his will. After he spoke to James to witness it, he wanted I should, and I said I was too old; he said that wouldn't make any odds. I have a recollection that I put my name to his will. The only time I can tell of, that V. H. mentioned the word *will*, was when he asked James to witness his will." The attesting clause is also regular on this point.

In *Jauncey v. Thorne* (2 Barb. Ch., 40), there were three subscribing witnesses: none saw the testator sign. To one of them he acknowledged the signature, but said nothing about its being his will. The second witness testified that the testator pointed to the paper, and told him to sign as witness; and witness thinks he said it was his will. The third witness testified that the testator acknowledged and declared the instrument to be his will, and requested him to sign as witness, and that the other witnesses were present. This, the chancellor held sufficient, under the act of 1813 (1 Rev. Laws of 1813, 364), which required the will to be attested and subscribed by three or more witnesses: that it was not necessary for each witness to swear to all the requisites of the statute: that the attesting witnesses should see the testator sign the instrument, or say or do something in their presence and hearing, indicating that he intends to recognize the instrument, upon which his name appears, as his will, but he need not so expressly declare it: that the court will presume liberally in favor of wills, when, after lapse of time or other circumstances, it is impossible to give positive evidence. The will was dated in 1825, and propounded in 1835.

In *Remsen v. Brinckerhoff* (26 Wend., 325), the attesting clause was full, the witnesses testified that the testatrix signed her name in their presence, acknowledged it to be her signature for the purposes therein mentioned, but no one said that the instrument was a will, nor was it or the attesting clause read over. Held, under the law of 1830 (2 Rev. Stat., 1 ed., 7, § 40), which is substantially like the present, that there was no valid execution. The chief-justice (NELSON),

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however, says (p. 331), that no form of words is necessary; "the Legislature only meant there should be some communication to the witnesses, indicating that the testator intended to give effect to the paper as his will. Any communication of this idea, or to this effect, will meet the object of the statute. . . . The mere want of recollection of the witnesses that the testator indicated the instrument to be his will, after signing the attestation clause, ought not to be evidence *per se* of non-compliance with the statute. After this there should be something like affirmative proof of the want of publication."

In *Nelson v. McGiffert* (3 Barb. Ch., 158), the question was, whether the witnesses signed at the request of the testator. The attestation clause was full; two did not recollect, and the other did. *Held*, good: that if after a lapse of time (from 1832 to 1840), the witnesses do not remember, but the attestation clause is full, a court may infer that the requisites were complied with (*Newhouse v. Godwin*, 17 Barb., 236); —that in the execution of wills the statute does not require any particular form of words to be used by the testator, either in the admission of his signature in the publication of the instrument as his will, or in the communication to the witnesses of his request or desire that they should subscribe their names as attesting witnesses, but that it is sufficient if the formalities required by the statute are complied with in substance.

Seguine v. Seguine (2 Barb., 385), recognizes a similar principle. EDMONDS, J., says, in regard to the publication: "The object of the statute was to receive evidence that a testator, when he executed the instrument, knew that it was a will and not an indenture, or deed of a different character."

In *Lewis v. Lewis* (11 N. Y. [1 Kern.], 220), the attesting clause was full. One of the witnesses testified that the testator called the witnesses into his office, where he had a paper, of which he turned up so much as would allow them to write their names, requesting them to sign their names and add their residences; and also said, "I declare the within to be

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my free will and deed." This was all that was said, and the witness did not see the testator sign, or see his signature, and did not know what the instrument was. The other witness did not remember any thing more. *Held*, that the instrument was not properly executed as a will. '(Same case in 13 Barb., 17.) So a will is duly executed when the several acts required by the statute have been performed at the same time, whatever the order in which such acts were severally performed. (*Doe v. Roe*, 2 Barb., 200; *Keeney v. Whitmarsh*, 16 Barb., 141.) In *Chaffee v. Baptist Missionary Convention* (10 Paige, 85), the subscribing witnesses testified that when they went into the decedent's room, she took the instrument, which then had her name to it, out of her drawer, and putting her finger on her name, said, "I acknowledge this to be my last will and testament," but did not admit that she had subscribed her name to the will, or that it had been subscribed at her request. *Held*, not enough,—there was no acknowledgment of the subscription. In *Rutherford v. Rutherford* (1 Den., 33), one of the witnesses told the other as he came into the room, in the presence of the testator, in answer to the question what they wanted him to sign, that it was "the will or agreement" of the deceased, and that he (the deceased) wanted him to sign it. *Held*, not sufficient evidence of publication.

In *Seymour v. Van Wyck* (2 Seld., 120), the testator told one of the witnesses that he had had a codicil to his will written. He asked for his will: it was handed to him. Witness told him it would require two witnesses. The other witness was then called, and came in. Testator then signed the codicil; and afterwards the witness signed, but nothing else was said by the testator about its being a codicil. *Held*, void on account of no declaration to the second witness, that it was a codicil to his will. The inference is, that the declaration to the first witness was sufficient. In *Brown v. De Selding* (4 Sandf., 10), one of the witnesses, before the other came in, asked the testator if "she wished to sign," or "sign her will," he could not tell precisely which. The testatrix thereupon got

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up, the other witness came in, and the testatrix asked "where she must sign the will," and on the place being pointed out, took the pen and signed. The other witness testifies that when he came in, the first witness told the testatrix he was the person whom he had invited to come in and witness her signature to her will: that "she distinctly asked where the proper place was for her to sign." Also, he spoke of "her asking the question about the place where to sign the will." *Held*, no declaration.

Where the witnesses are dead, or from lapse of time do not remember the circumstances attending the attestation, the law, after the diligent production of all the evidence then existing, if there are no circumstances of suspicion, presumes the instrument duly executed. (*Butler v. Benson*, 1 Barb., 526, and cases there cited.) In this case, ten years had elapsed, one of the subscribing witnesses had nearly forgotten the whole transaction, and the other about as much lost on important points.

The reading of the attestation clause in the presence of the testator and the witnesses, followed by the affirmation of the testator that it is his will, is a sufficient acknowledgment of the signature. (*Whitbeck v. Patterson*, 10 Barb., 608.) It must appear that the testator intended to give the witnesses to understand that it was his last will and testament, and that he had subscribed it as such; and if the witnesses knew that the paper was his last will and testament, from communication made to them by him, or in his presence, it is sufficient. (*Torry v. Bowen*, 15 Barb., 304. See, also, *Burritt v. Silliman*, 16 Id., 193; *McDonough v. Loughlin*, 20 Id., 238; *Nipper v. Groesbeck*, 22 Id., 670.) In this last case, decided at the General Term of the fifth district, the question was whether there was a sufficient publication. The will was read over by the testatrix, and then read over to her in the presence of the witnesses. About an hour afterwards she requested to have the will brought, that she might sign it. It was brought and she signed it, and the subscribing witnesses then attached their signatures, at the suggestion and request

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of the testatrix. One witness stated that after the will was read, the testatrix said: "Bring me the will, and I will write my name." *Held*, a sufficient publication. (See, also, 2 *Bradf.*, 42, 226, 261, 427, 163; 3 *Id.*, 78, 101, 353, 357, 35, 322.)

In the present case, it is to be observed, in the first instance, that the attesting clause is full; that the will was signed more than five years ago, as the witnesses swear, and about ten years by the date of the will; and that the recollection of the witnesses, in many instances, is not distinct. One of the witnesses swears he cannot tell positively whether Van Hooser subscribed his name in his presence, but thinks he did. On cross-examination, this witness, in answer to the question whether he heard the testator say that the name purporting to be his, to the paper, was his signature, says: "I can't swear positive, but think he did say so." The other witness asked the testator if that was his name there (pointing to the paper)—if he put it there with his free will and accord; and the testator said, yes, and then witness signed his name. Both witnesses testify that they were all there together until both witnesses signed; and if so, this declaration must have been made in the presence of both. There was no evidence to the contrary. I think the statute has been plainly complied with in this respect, and that the testator acknowledged his signature to both of the witnesses.

The only serious question in the case is, whether the testator, at the time of acknowledging his subscription, declared the instrument so subscribed to be his last will and testament. It was not done in those words, or by those terms. That is not necessary. The witnesses must be informed by some unequivocal acts or words of the testator that the instrument, which the testator has subscribed, is his last will and testament. If this is done, it is, to my mind, a substantial compliance with the statute, and nothing less than this will do. In this case, both witnesses, on the direct examination, testify that the testator declared to them that the instrument was his will. On cross-examination, neither recollects

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that the word *will* was mentioned at any other time than when testator asked the first witness to witness "his will," and said to the other witness, "I want you to witness it too." Upon the cross-examination the case would stand thus: the testator, in the presence of both witnesses, held the instrument open in his hand, which had been signed by him, and the signature acknowledged to both witnesses, and said to one witness, in the presence and hearing of the other, "I want you to witness my will." The witness signed his name to the paper as witness; and then the testator said to the other witness, "I want you to witness it too," and the other witness then signed his name as witness. This evidence alone would show that the paper to which the witnesses signed was called by the testator, in the presence of and to them, "*his will*." It makes no difference that this fact was communicated to them by the same act or words that requested them to sign as witnesses. The question is, *did they both understand, from some unequivocal act or saying of the testator to them, that the instrument was his will.* Mr. Surrogate BRADFORD, in *Rieben v. Hicks* (3 *Bradf.*, 358), well says: "The single question, in this class of cases, is, has the testator subscribed or acknowledged the will in the presence of the witnesses, made known to them its nature, and requested their attestation; and have the witnesses subscribed their names? Simple performance of any one, will not be taken for performance of any other; but performance of two or more at one time, is not void because there was a joint or connected performance. If the things required have been done, the *modus in quo* is not ordinarily of the slightest materiality."

In this case, taking into account the lapse of time, and the full attestation clause, together with the testimony as given, I think there is no doubt but that the testator, on the occasion of acknowledging his subscription, substantially declared the instrument so subscribed to be his last will and testament.

The will is, therefore, admitted to probate.

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JEFFERSON COUNTY—HON. MILTON H. MERWIN, SURROGATE—August, 1861.

HAVEN v. HAVEN.

In the Matter of the Settlement of the Accounts of the Executors of DEXTER HAVEN, deceased.

The testator directed that, after the payment of his debts and a certain annuity to U., all his real and personal property should go to his widow for life. One of the debts against the estate was in the nature of a life annuity to N. H.

Held, 1. That both these annuities should be paid out of the principal, and not out of the income, of the estate.

2. That after the payment of the annuities, debts of the estate, expenses of administration, and funeral expenses, the balance should be invested in permanent securities, and the net income, and rents, and profits paid to the widow.

This was an application by the executors of the last will and testament of Dexter Haven, deceased, for the final settlement of their accounts as executors, and for directions as to the payment of certain legacies, and the final disposition of the fund in their hands.

JOHN LANSING, *for the Residuary Legatees.*

J. CLARKE, *for the Widow.*

THE SURROGATE.—The will of Dexter Haven provides, 1st, for the payment of funeral expenses and debts "out of my estate;" 2d, an annuity to Nathaniel Haven, his father, of \$35, "to be paid annually after my decease, during his natural life;" 3d, he gives "all my real and personal estate, goods, and chattels, of whatsoever nature or kind, to my wife, Mary Haven, to be used and enjoyed by her during her natural life." At her decease the testator makes certain specific bequests, and then bequeaths all the remainder of

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his real and personal estate equally to his brothers and sisters, naming them. The will is dated February 8, 1856. On the 21st May, 1859, a codicil is made, revoking the bequest to Nathaniel Haven, and then says: "I do hereby give and bequeath unto William Usher, of the State of Missouri, the sum of thirty-five dollars a year, to be paid annually after my decease, during his natural life."

There is a debt existing against the estate in the shape of a life annuity to Nathaniel Haven, senior; and the most important question to be decided is, how shall this annuity and the annuity to Usher be paid—whether out of the annual income, or out of the principal of the estate; the widow claiming that both shall be paid out of the principal.

There is no direction in the will how these shall be paid. The deceased left personal property about \$8,000, and real estate in value about \$4,000. His debts, aside from the annuity, are less than \$1,000. He left no descendants, and the Nathaniel Haven, senior, spoken of, is his father, and Mr. Usher is the brother of his wife.

The intention of the testator is to be gathered from the will and the surrounding circumstances. (2 *Will. on Ex.*, 972.) The will and codicil are to be construed together, as parts of the same instrument. (*Westcott v. Cady*, 5 *Johns. Ch.*, 334; *Willett v. Sandford*, 1 *Ves., Sen.*, 186.) The testator directs that his debts and funeral expenses shall be first paid, then the annuity to Nathaniel Haven,—and the annuity afterwards given to Usher, is evidently in place of this; and then thirdly, that is, after the debts and annuities are paid, he gives all his estate to his widow for life. It seems to me that the design of the testator was to first provide for the debts and annuity, and what was left should be held by the widow for life; that he so meant when he said "all his real and personal estate should go to the widow," &c., and it would only more fully express the idea to say, the balance of his real and personal estate. (See *Will. on Ex.*, 1224.) If this construction is right, then the debts, expenses, and annuity are to be provided for out of the principal, before the

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amount, upon which the widow is entitled to receive interest, can be ascertained. That is to say, the capital of the estate is the amount of the assets at the date of the testator's death. From this deduct, 1st, the legal expenses of administration and funeral expenses; 2d, the debts of the estate paid, and an amount sufficient to purchase a life annuity for Nathaniel Haven, sr., to satisfy that debt of the estate to him; 3d, an amount sufficient to purchase a life annuity for William Usher, of \$35, commencing at the date of the testator's death (*Craig v. Craig*, 3 Barb. Ch., 76); 4th, the balance shall be invested in permanent securities, and the net income, after deducting taxes and expenses of investing, should be paid to the widow. The executors are responsible for this balance to the residuary legatees. (*Clark v. Clark*, 8 Paige, 152; 2 Barb. Ch., 211.)

JEFFERSON COUNTY—HON. MILTON H. MERWIN, SURROGATE—April, 1862.

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In the Matter of the Administration of the Estate of JACOB LOWE, deceased.

The nullity of a marriage, voidable merely, must first be pronounced by a court of competent jurisdiction, before the fact of its invalidity can be taken advantage of in any proceeding. If not declared void, it remains good and legal for all purposes, and either party surviving the other has a prior right to letters of administration.

Where a woman, whose husband had been absent for more than five successive years, without being known to her to be living, and was reputed to be dead, cohabited with the intestate, and lived with him as his wife for twenty years, until his death; and the first husband, though living, had not obtained a decree annulling the second marriage;—*Held*, that the woman was the widow of the intestate, and was entitled to letters of administration on his estate, in preference to all others claiming them.

The fact that the abandonment was on the part of the wife, and not of the husband, can make no difference. The mere fact of *absence*,—where it

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does not appear that it was created with a view of avoiding the statute,—is sufficient, without reference to the manner, or the reason, or occasion of it.

Under the Laws of 1830, ch. 320, § 28, a marriage, though not performed in accordance with the Revised Statutes, is not for that cause illegal.

This was an application for letters of administration upon the estate of Jacob Lowe, deceased. His sister, Margaret White, applied, and her claim was contested by Christina Lowe, claiming to be the widow of the deceased. The deceased left no descendants, parents, or brothers. The sister was, therefore, next entitled after the widow.

J. F. STARBUCK, *for Applicant.*

F. W. HUBBARD, *for Contestant.*

THE SURREGATE.—From the evidence given, I find the following facts:

That Christina, over forty years ago, was married to Lawrence Connolly, and lived with him as his wife. This was proved by the declarations and acts of Christina. (2 *Greenl. Ev.*, § 462; 1 *Conn. & H. Notes*, note, 469, 782; *Jackson v. Clare*, 18 *Johns.*, 346; 1 *Edw.*, 377, 378):

That Connolly is still alive, and Christina has never been divorced from him:

That about forty years ago, Christina and Connolly separated, and it is claimed by the applicant that she *abandoned* him. It appears that Connolly went to Canada temporarily, and with the intention of returning; and, soon after he went away, Christina left with Lowe, taking with her a son she had by Connolly. Soon afterwards Connolly returned, but afterwards removed to Canada to live. Christina swears that she and Connolly agreed to separate, and that each left the other in pursuance of the agreement. There is no evidence contradicting this, and perhaps the acts of the parties were not inconsistent. I think it sufficient for me now to find that they separated, and did not afterwards live together.

About twenty years ago, or, as Christina testifies, about July, 1840, she was married to Jacob Lowe, and from that

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time lived with him as his wife, until his death, in 1856. She further testifies, that for some twenty years before she married Lowe, she had not heard from Connolly, and did not know that he was living, but had heard of his death some six years before. The applicant offers evidence to show that she did know of his being alive within five years before her marriage with Lowe. Evidence of her knowledge, after the marriage, I do not consider important; and the only evidence of her knowledge before that time and within five years, is in the testimony of Nathaniel Ingerson. He says that after the church trial, or about that time, he heard Christina say she had a husband in Canada, and that this was between 1835 and 1840. Christina, in speaking of the church trial, says she was married to Lowe before then, and she denies the conversation with Ingerson. The other declarations of Christina offered in evidence by applicant, as to her knowledge of Connolly's living, were all more than five years before her marriage with Lowe. She herself swears that she did not know he was living till some ten years after such marriage, when her son saw him in Canada. It also appears that some four or five years before the marriage, there was a pretty general rumor of Connolly's death. I think, upon the whole, the applicant has failed to prove that Christina knew of Connolly's living within five years before her marriage with Lowe, or overcome her positive oath denying such knowledge.

Upon these facts, the legal question arises, whether Christina is the widow of Lowe for the purpose of this application, —Connolly, her former husband, being still alive, and the relation of husband and wife still in law existing between them.

Section 5 of 3 Rev. Stat., 5 ed., 227, provides that if any person, whose husband or wife shall have absented himself or herself for the space of five successive years, without being known to such person to be living during that time, shall marry during the lifetime of such absent husband or wife, the marriage shall be void only from the time that its nullity shall be pronounced by a court of competent authority.

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In other words, the marriage is voidable, not void. Now what are the rights of the parties under a voidable marriage? Dower attaches upon all marriages not absolutely void, and existing at the death of the husband. It belongs to a wife *de facto*, whose marriage is voidable by a decree, as well as to a wife *de jure*. (4 *Kent.*, 3 ed., 36; 1 *Greenl. Cruise*, 155.) Likewise, the husband will have curtesy. (*Id.*, 154, § 5.) When the contract of marriage is void absolutely, the husband is not entitled to administration upon the wife's estate; but when it is voidable, and sentence of nullity has not been declared, he is entitled. (1 *Will. Ex.*, 358.) By common law, a second marriage, while the first husband or wife was living undivorced, was void. (2 *Kent.*, 78, 80; *Williamson v. Parisien*, 1 *Johns. Ch.*, 389.) This was the rule in this State prior to the Revised Statutes, though the penal consequences did not follow where the second marriage took place after absence of five years. (1 *Johns. Ch.*, 389.) To prevent the marriage being absolutely void, the Revised Statutes changed this rule and made the marriage voidable only. (*Revisers' Notes*, 3 *Rev. Stat.*, 2 ed., 660.) It is to be assumed that the Legislature, in changing the law, meant to place such marriages on the same footing as all other voidable marriages. That is the inference from the act.

Applying these principles to the case before us, we have a legal marriage, that so continued to the death of the husband, and still so continues; and if legal, the widow must be entitled to all the rights that the law gives to widows, of which the right to administer upon her deceased husband's estate is one. In *Valleau v. Valleau* (6 *Paige*, 207), a bill was brought for a divorce on ground of adultery. The plaintiff had abandoned his wife, and she, not knowing him to be living within five years, married again. Plaintiff then returned, and defendant continued to live with the second husband. *Held*, not adultery; that the last marriage being voidable merely, but not void, the remedy of the first husband is by bill to annul the voidable marriage; and then, if his wife cohabits with the second husband, it is adultery, and that it

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would be illegal to cohabit with the first husband or wife till the second marriage was declared void. This is the only adjudication I find upon the statute in question; and if the doctrine there laid down is correct, the nullity of any such marriage must first be pronounced before the fact of its invalidity can be taken advantage of in any proceeding. If not declared void, it remains good and legal for all purposes. The children of such marriage would be legitimate, because born in lawful wedlock (1 *Blackst. Com.*, 445); and for like reason, they would succeed as heirs to the property of their father or mother (2 *Greenl. Cruise*, 138), unless, and until, the marriage was declared void. I think this the reasonable construction of the statute, and that, therefore, Christina is now the legal widow of the deceased, unless there is some other valid objection in the way.

But it is claimed that Christina is not entitled to the benefit of the provisions of the statute, for the reason that her first husband did not absent himself from her, but, on the contrary, that she absented herself from him and abandoned him, and is therefore not within the statute.

This provision is similar to that of the criminal law (3 *Rev. Stat.*, 5 ed., 967, § 9), which excepts from the operation of the statute in relation to bigamy, "any person, by reason of any former marriage, whose husband or wife by such marriage shall have been *absent* for five successive years, without being known to such person within that time to be living." This also followed the provision of the Revised Laws (1 *Rev. L.*, 113), which excepted any person "whose husband or wife shall have *absented* him or herself, the one from the other, by the space of five years together, the one of them not knowing the other to be living within that time." All these provisions are modelled from the statute of James I. (2 *Kent*, 79, 80, 3 ed.; *Bishop on Divorce*, 3 ed., § 203), in which the exception was, "those persons whose husband or wife *should have remained* seven years beyond sea, or the same period within his majesty's dominions, not known to the other to be living." So in the statute, 9 George IV. (cited in *Bishop on*

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Divorce, § 203, *note* 1), repealing the statute of James, the phraseology is, "whose husband or wife shall have been *absent*," &c.

None of these provisions make any reference to the reason or occasion of the absence. Undoubtedly, they all mean to carry out the same idea. The criminal statute, as it now stands, uses the phrase, "shall have been absent," while the Revised Laws reads, "shall have absented himself." But, judging from the Revisers' Notes (3 *Rev. Stat.*, 2 ed., 825), the same idea was meant to be conveyed in both cases. Taking all the provisions cited together, the fair conclusion, it seems to me, is that the fact alone of absence, the one from the other, for the specified time, without knowledge of the other living, will bring the party within the statute.

Upon the facts of the case under consideration, it may be a question whether it be necessary to decide this point. Christina and Connolly lived at Denmark, Lewis county, some forty years ago. Christina left and went to reside in Brownville, Jefferson county. Connolly also afterwards left and went to Canada. He knew where Christina lived in Brownville, but he absented himself—in other words, voluntarily left, and remained absent for five years, and was reputed dead. His place of residence in Canada was unknown, and it does not appear that Christina had the means of finding it out. The reason why he left, or the position of the party remaining, the statute does not in terms regard. From these facts, it might be argued that Connolly had absented himself, inasmuch as he knew where Christina was, but she did not know where he was. However, I put the case upon the other ground, holding that the mere fact of absence is sufficient. If it should appear that the parties had created the absence with the view of avoiding the statute, the rule might be different.

The point raised by the counsel for the applicant, that the marriage of Christina with Lowe is not legal, because not performed in accordance with the Revised Statutes, is fully answered by the law of 1830, ch. 320, § 28, which provided

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that the provisions of the marriage act should not be construed to require the parties to any marriage, or any minister or magistrate, to solemnize the same in the manner therein prescribed, but that all lawful marriages contracted in the manner theretofore in use in the State should be as valid as if the marriage act had not been passed. (3 *Rev. Stat.*, 5 ed., 229, § 18.)

Having these views, I must hold that Christina Lowe is entitled to letters.

OSWEGO COUNTY—HON. AMOS G. HULL, SURROGATE—November, 1863.

WYLES v. GIBBS.

In the Matter of the Administration of the Estate of RUSSEL WYLES, deceased.

Where a wife abandoned her husband, on account of his intemperate habits, cruel treatment, and absence from home, and during five successive years resided in an adjoining county, with a second husband, and it did not appear that she had knowledge of the death of her first husband, or that he was not generally well known to be living,—*Held*, not such a continuing absence for five successive years, within the provision of 3 *Rev. Stat.*, 189, § 6, as to render valid the second marriage, and authorize the issuing of letters to the woman as the widow of the second husband.

There should be a *bona-fide* absence of the absconding person from the State, and without being known to the other party to be living; or, at least, there should be such an absence from the county as would preclude the idea that he was living, after the most careful and diligent inquiry had been made.

B. WATSON, for Administrator.

LUDINGTON, TOWNSEND, PARDEE, and WART, for Petitioner.

Joseph Gibbs having filed a petition in behalf of Sophronia Gibbs, his wife, a daughter of the deceased, setting forth, among other things, that the intestate left no widow, and having filed the necessary preliminary papers, was, on the

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11th day of March, 1861, appointed administrator of said estate. Since such appointment, a lady, claiming to be the widow of the deceased, and signing her name Almira M. Wyles, filed her petition, claiming the right to administer on said estate.

Gibbs being cited to show cause why the letters to him should not be revoked and set aside, appeared and filed allegations, contesting the right of the petitioner to administration, and alleging the petitioner to be the lawful wife of one Dennis Jordan, then living in Rome, in the county of Oneida.

On the trial, the petitioner presented and proved a regular marriage certificate, from which it appeared that she was married to Wyles, the intestate, on the 14th day of February, 1856, at the town of Redfield. It was also shown that Wyles and the petitioner lived together as husband and wife from that time until the decease of the intestate.

The administrator then proved a marriage between the petitioner and one Dennis Jordan, which was duly solemnized at the village of Rome, on the 29th day of December, 1845. It was also proved that Jordan and the petitioner lived together as husband and wife, from the time of such marriage, for about two years. That Jordan has always resided at Rome since the marriage, and has never been absent from Oneida county until he came to Fulton to attend the trial of this cause.

THE SURREGATE.—The petitioner, in order to avoid the effect of the marriage with Jordan, seeks to bring her case within the provision of the statute, which enacts as follows: "If any person, whose husband or wife shall have absented himself or herself for the space of five successive years, without being known to such person to be living during that time, shall marry during the lifetime of such absent husband or wife, the marriage shall be void only from the time that its nullity shall be pronounced by a court of competent authority." (2 *Rev. Stat.*, 139, 4 ed., 321.)

With a view of showing the absence of Jordan, the pe-

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tioner proved that he was an idle man, a "bee-hunter," and grossly intemperate in his habits; that for the last five months that they lived together, he had neglected to provide for her, and that for about a week before she left to return to her father's, he had been absent from home; that she did not hear from him during that time, and knew not where he was, and that she had never seen him since; that before he left he had used violence towards her, and had struck her and otherwise ill-treated her; that she was out of health and had no means of support, and that her friends were poor; that after Jordan had been absent about a week, the cold weather approaching, and she destitute of fuel and food, left a note on the table for him, stating that she was going home to her father's; that her father the same day took her and her child to his residence in Redfield, a distance of about thirty-seven miles by stage route, where she has continued to reside ever since; that Jordan has never made any effort to see the child nor his wife since, nor has he provided any thing for their support.

It appeared, by evidence introduced by the administrator, that Jordan has not only always resided in Rome since the petitioner left, and always upon the same street, and not more than one-eighth of a mile from the place where he resided while he and his wife lived together; but that for about one year and a half after she left, he resided in the same house where they dwelt at the time of her leaving; that Wyles was well acquainted with Jordan, and met him frequently before his marriage with petitioner, and while he was boarding in her father's family.

In respect to the foregoing facts there seems to be no conflict of evidence.

The petitioner testified that she had been informed of Jordan's death, and that she had no knowledge of him after leaving Rome; but it did not appear that she ever returned to the house she had left, or even made inquiry there for Jordan.

Were we to stop here, should we be justified in saying

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that Jordan had absented himself from his wife, in such a manner as to bring her case within the statute sufficiently to declare her second marriage valid for the purposes she requires?

It was conceded, on the trial, that the conduct of this cruel husband and unnatural father, in brutally ill-treating his wife, omitting to provide for her and for the sustenance of his offspring, and then leaving his home on a drunken debauch for a week at a time, and his subsequent neglect to seek them out and contribute to their maintenance, was such an absence as would justify a court in giving a construction to the statute favorable to the petitioner.

Sympathy for an unfortunate woman, and commiseration for the cruelties she had suffered, might be legitimately invoked in a tribunal of conscience, to induce the court to give as indulgent an ear as possible, consistent with justice, in behalf of the unfortunate, to doubtful testimony. But sympathy must have its bounds, and compassion yield, in individual cases, before the stern and unbending requirements of the public good.

This is not so much a question of evidence. I am required to give a construction to this statute.

Jordan always having resided in the same village since his marriage, and in the same section of the village, and for a year and a half in the same house occupied by himself and wife at the time the latter left, and a part of the time at a public hotel, and never out of the county for a moment for fifteen years, and, so far as any thing appears, never out of the town,—is it a fair construction to say that he has absented himself from his wife, within the meaning of the statute?

The object and intent of the Legislature was to mitigate the rigor of the common law. (3 *Rev. Stat.*, 2 ed., 660, notes.) By the common law, the marriage with Wyles would have been absolutely void. It is contended, on the part of the administrator, that notwithstanding the statute, so far as the rights of the petitioner in this case are concern-

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ed, the marriage with Wyles is absolutely void: that the object of the statute was to relieve the party from the penal consequences of the second marriage only. It is true that a remark of Judge KENT would seem almost to hold that doctrine. (2 *Kent's Com.*, 2 ed., 80.) But in the view I take of this case, it is not necessary to decide that point.

Did the Legislature intend by this statute to use the word "absented" in any technical sense? There is nothing in the subject-matter of the statute to show any such intention. With a fair and legitimate use of language, how can it be said that a person has absented himself for five successive years, who has continued all that time to reside in the same place and to pursue his ordinary routine of life? Such a construction ought to be given to statutes as will tend to make them operative, and not defeat their fair intent. (*People v. Utica Ins. Co.*, 15 *Johns.*, 358.)

The sanctities and immunities that cluster around the marriage contract cannot be guarded too vigilantly. Public policy requires that courts should see that no loose or vague construction be given to statutes upon which hang such momentous consequences to the good order of society, as those which affect the conjugal relation.

Were the foregoing all the facts in the case, a fair construction of the statute would require me to hold that Jordan had not absolutely absented himself in such a manner, or to such an extent, as would sustain the petitioner in the claims she presents.

But there are other facts that bear on the question adverse to the petitioner.

It seems that she went to Rome on two occasions before her marriage with Wyles, and after she had left Jordan; and on one occasion remained a week, but without going to the house she had left, or without making any inquiries of Jordan's relatives, with whom she had lived while cohabiting with him, as to his whereabouts. Prudence would have required that she should have made careful inquiry for her husband, before contracting the second marriage.

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Courts cannot protect parties against the manifest consequences of indolence or gross credulity. While the petitioner and her little child were living separate from Jordan, and in her father's family, and before her marriage with Wyles, the latter resided in the same family for several years; during which time he occasionally met Jordan in Rome, with whom he was well acquainted. It would require some credulity to believe that the existence of such a cruel husband and heartless father was never the subject of conversation between the petitioner and the intestate, although it is true the petitioner was not interrogated on that point.

Henry Wright, a witness for the administrator, testified that in the spring of 1853 he had a conversation with the petitioner, in which he inquired of her if she had heard from Jordan, and that she replied that she had heard from him occasionally, and that he resided in Rome.

Walter Brown also testified to conversations with the petitioner in 1852-3, in which the conduct of Jordan was mentioned, in which she stated that Jordan had manifested a disposition to get possession of the child.

Without referring to the large mass of other testimony of a conflicting character, or to the question of the credibility of the witnesses sought to be impeached, I am compelled to the conclusion that the weight of evidence preponderates against the petitioner. There should be a *bona-fide* absence of the absconding person from the State, and without being known to the other party to be living; or, at least, such an absence from the county as would preclude the idea that the absconding person was living, after the most careful and diligent inquiry had been made.

The petition must therefore be denied, but without costs.

In order, however, to protect the rights of all parties concerned, I deem it my duty to place my decision on the construction I give the statute, based on the facts in the case, concerning which there was no conflict of evidence.

I cannot close this case, however, without expressing my deep regret that the children of the intestate should have in-

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stituted these proceedings. They are represented to be in comfortable circumstances. The petitioner, without help from the estate, would be destitute and needy. She was faithful and kind to their father—the mother of his child. Respect for his memory should have caused them to forbear making this claim. The sweets of humanity are more precious than dollars. It is devoutly to be hoped that they will reflect how much better they can afford to forego their claims, than, by insisting upon the strictness of legal rules, deprive the petitioner of the property in question.

OSWEGO COUNTY—HON. AMOS G. HULL, SURROGATE—March, 1868.

MOORE v. GRISWOLD.

*In the Matter of proving the Last Will and Testament of
SAMUEL GRISWOLD, deceased.*

Where a will appears, on its face, to have been duly executed and published as a last will and testament, in the presence of three witnesses, and after a lapse of thirty-five years, the witnesses being dead, their signatures and that of the testator are proved, and other facts appear indicating care and circumspection attendant upon the execution of the paper, —*Held*, that it will be presumed that all the other formalities required by law, for the attestation of a valid will, were complied with.

Proof that a will, subsequent to the one offered for probate, was made and duly executed and published by the testator, although the subsequent will cannot be found, and is not, therefore, offered, —*Held*, sufficient ground for refusing probate to the one offered.

The facts fully appear in the opinion.

R. H. TYLER, for Ann Moore, the petitioner.

COMSTOCK, NOXON, & COMSTOCK, for A. V. G. Comstock, an heir.

E. S. PARDEE, for the heirs of Eliza Beach.

S. N. DADA, for Thetis Williams.

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THE SURROGATE.—Ann Moore, a daughter of the late Samuel Griswold, propounded for probate an instrument executed at Barkhamstead, Connecticut, bearing date the 14th day of January, 1828. All of the heirs and next of kin of the deceased, except one, filed allegations contesting the validity of the instrument, on the ground :

1. That the requirements of the law in respect to the publication of the instrument, the request to witnesses, and the signing of the witnesses in the presence of the testator at the end of the instrument, had not been complied with.

2. That the said Griswold had revoked the instrument offered for probate, by the subsequent lawful and valid execution of a last will and testament, containing a clause revoking all former wills.

The instrument presented for probate does not contain the usual attesting clause in full. It contains these words, however, at the conclusion : "I do, at Barkhamstead, this 14th day of January, A. D. 1828, sign, seal, and publish this as my last will and testament, hereby revoking all other wills by me made. In presence of." It is signed and sealed by the testator, and the signatures of three persons affixed as attesting witnesses.

Proofs were offered and admissions made by contestants, establishing the fact that all three of the subscribing witnesses are dead. Depositions were read, proving the signatures of the subscribing witnesses, and oral testimony was given, establishing the signature of the deceased. The paper was found, a few days before it was offered for probate, among the sermons of the deceased, sealed and indorsed as "the last will and testament of the Rev. Samuel Griswold."

The counsel for the contestants, to sustain his first point, cited the case of *Moultrie v. Hunt* (23 N. Y., 394). But in that case it appears affirmatively that Hunt, the person executing the instrument, did not state to the subscribing witnesses the nature of the paper which he requested them to attest ; but, in this case, nothing appeared to show that all of the formalities required by law had not been complied with.

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The will, as appears on its face, having been signed, sealed, and published, as and for the last will and testament of the deceased, in presence of three witnesses, more than thirty-five years ago—and the witnesses being all dead, their signatures and that of the testator being proved, after this lapse of time ; taking into account the indorsement upon the paper, and other facts and circumstances proven on the trial, indicating the care and circumspection attendant upon the execution of the paper, under the authority of *Croft v. Pavlet* (2 *Strange*, 1109), *Chaffee v. Baptist Missionary Convention* (10 *Paige*, 85), I should be justified in presuming that all the other formalities required by law for the attestation of a valid will had been complied with. There is no reason, therefore, in respect to all the formalities required in order to make the instrument valid, why it should not be admitted to probate.

But it is contended that a subsequent instrument was made, about the year 1851, revoking all former wills. It was decided in the court of the King's Bench, in England, as long ago as 1688, that a subsequent valid will is a revocation of a former will *pro tanto*. (*Hitchins v. Bassett*, 3 *Mod. Rep.*, 203; *Eggleston v. Speke*, *Id.*, 258.) It was long a vexed question whether a subsequent will revoked a former one, unless the subsequent will contained a revoking clause. (*Willard on Ex.*, 119; *Van Wert v. Benedict*, 1 *Bradf.*, 114; *McLoskey v. Reid*, 4 *Id.*, 334.)

But our statutes, and the adjudication construing the same, have settled that question. The Revised Statutes point out the only modes by which a will may be revoked or altered :

1. By some other will in writing.
2. By some other writing of the testator, declaring such revocation or alteration, and executed with the same formalities with which the will itself was required by law to be executed.
3. By burning, tearing, cancelling, obliterating, or destroying the will, with the intent of revoking the same by the testator himself, or by another person in his presence, by his direction or consent.

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4. By certain changes in the testator's situation in life, as by marriage.

5. By partial revocations, occasioned by ademption of a legacy. (2 *Rev. Stat.*, 4 ed., 246.)

It is claimed by the contestants that the facts bring the case within the first subdivision above stated.

One witness testifies that about the year 1850 he called at the store of the deceased; that, after a little conversation, deceased inquired if the witness was in a hurry, and stepping a little from behind his counter, holding a paper in his hand, and looking out of the window, inquired of the witness who it was passing by; and being informed that it was Mr. Griffin, a neighbor, the latter was invited in by the deceased. The deceased then stepped behind the counter, still holding the paper, and addressing Griffin and the witness, remarked that his circumstances had somewhat changed recently, and laying the paper on the counter, said, "This is my last will and testament;" and further said, "I hereby revoke all former wills," moving his finger along down to the bottom of the paper; the deceased further saying, "This is my hand and seal." The deceased then showed where he wanted the witness and Griffin should sign their names, pointing out the place on the paper, and saying, "Gentlemen, I want you to sign there." The witness and Griffin then signed their names. The witness testified that as the deceased ran his finger along the paper, he said the words, "I hereby revoke all former wills." He testified that he saw the seal to the instrument at the time.

Mrs. Simmons, who had been some nine or ten years in the family of the deceased as housekeeper, and clerk in his store, testified that she saw the instrument referred to by the other witness, Mr. Somers, while it was being drawn; that the deceased wrote upon the paper a little every day, for several days, and laid it aside: that in his absence she read all that he had written, and that her reason for so doing was to ascertain whether he had made a legacy to her, as he had promised to do; that she read it over in company with Alex-

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ander V. G. Comstock, a grandson of the deceased; that she saw the deceased sign and seal the will, and saw him call in Mr. Griffin to witness it the next morning after it was drawn, and saw Griffin and Somers sign their names as witnesses; that she remembered seeing a clause in the will revoking all former wills. Griffin, the other subscribing witness, was proved to be dead.

Under this testimony, it appears clear that the will of 1898, propounded for probate, had been revoked by the subsequent will above referred to. I, therefore, order that probate of the instrument propounded be denied, and that the same be held and declared to be invalid as a will of real or personal estate.

The application of some of the contestants to have the costs paid by Mr. Moore, personally, cannot be entertained. On finding the will, it became the duty of Mr. Moore to offer it for probate. I see nothing tending to show that he has transcended his duty in the matter. His costs, and the costs of the contestants, may be paid out of the estate. If the amount is not agreed upon among the heirs, the same may be taxed on the usual notice.

KINGS COUNTY—HON. ROSWELL C. BRAINARD, SURROGATE—March, 1863.

KELSO v. CUMING.

In the Matter of the Accounting of JOHN S. KELSO, Administrator of the Estate of THOMAS W. CUMING, deceased.

L. C. devised premises to the intestate, "if he should live until he is twenty-one, or marry:" in case of his death under twenty-one, unmarried, then to V. The intestate died under twenty-one, unmarried.

Held, 1. The fee had vested in the intestate, and was not contingent upon his arrival at the age of twenty-one, or his marriage.

2. The rents and profits accruing between the vesting of the fee and the death of the intestate belonged to him, and the remainder thereof

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left unexpended, were assets in the hands of his administrator, to be accounted for.

8. The rents and profits accruing after the death of the intestate went with the fee to V.

But where certain personal property was bequeathed to the intestate, on the same terms, to be held *in trust* for him until he was twenty-one,—*Held*, that V. took the property either as next of kin of L. C., or by the will.

The will of Louisa W. Cuming, among other things, contained the following bequests: "I give and bequeath to my son, Thomas Waring, all my silver and plated ware, and two parlor clocks, and direct the same to be held in trust for him until he shall marry, or arrive at twenty-one years of age."

Then, after giving a life estate to her husband, in all her property, real and personal, "I give, devise, and bequeath to my son, Thomas Waring, all my property, real and personal, of every nature and kind, except the aforesaid household furniture, watch, and jewels, after the death of my husband, if he should live until he is twenty-one years of age: or if he should marry before he is twenty-one years of age, and die, leaving a child or children, then I give, devise, and bequeath the same to his child; or, if more than one, then to be divided equally among them. If my son should die before he becomes twenty-one years of age, unmarried, and without leaving a child or children, and my husband should have departed this life, then I give, devise, and bequeath to my sisters, Leonora P. Van Antwerp and Estherina M. Fisher, all the estate given to me by my mother, of every nature and kind, and also my silver and plated ware and two parlor clocks, to be equally divided between them; and in case either of my said sisters should depart this life without leaving a child or children, then the survivor to take the whole," &c.

The father died a few hours after the mother, on the 26th day of August, 1856. The son, the intestate herein, being a minor, the general guardian, under the will, took possession of his estate and managed all his affairs until the intestate's death, under age and without issue, when he paid and delivered the net balance of the personalty of the estate to the administrator of the intestate, John S. Kelso, the husband of

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Leonora P. Van Antwerp, the surviving residuary legatee,— Estherina M. Fisher, the other residuary legatee, having died before the intestate. The administrator, on receiving the personalty of the estate from the intestate's guardian, consisting, 1st, of the net balance of the intestate's income unexpended in his support, amounting to \$8,199.94; and 2d, the silver and plated ware and the two parlor clocks, held in trust for the intestate, valued at \$2,065.33; he invested the cash for the benefit of his wife, as residuary legatee, and also delivered to her the balance of the proceeds of the personal property.

On his final accounting, exceptions were filed by Hugh F. Cuming and Anne Briscoe, brother and half-sister of the intestate's father, who claimed that the administrator should account for \$8,199.94, rents and profits of the real estate, and should also account for \$2,065.33, appraised value of the articles of silver ware, and other property, also received from the guardian, and claimed by Leonora P. Kelso, as her property, under the will of her sister, and not as assets of the intestate's estate.

ROBERT BENNER and CHARLES TRACY, *for the Administrator.*

I. The gift of the personal fund to the son is conditional, and he could not take the principal or income until the happening of the contingent event. If such event should not happen, the gift to him would fail, and the fund would go to Mrs. Kelso, survivor of Estherina M. Fisher. The gift to the husband for life is absolute; and the gift to the son, and alternately with him to the sisters, depends on a condition precedent. A contingent remainder in fee, being a remainder that might be or might not be, according to the happening of a specified future uncertain event, always failed if the particular estate in fact ceased before the event happened. (*2 Blackst. Com.*, 165, *et seq.*) In the law of personal property, however, the rule was different, and when the particular interest ceased, the property awaited the happening of the event; and if the event so turned out as to give effect to the future disposition, then the future interest commenced,

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although an *hiatus* had separated it from the particular estate by a period of time. The bequest clearly is made on a condition precedent. The gift is made to the son, "if he should live until he is twenty-one years of age," &c. If he should live until that age, the property shall be his: if he should not live to that age, &c., the property shall go to the others named. If the son dies childless, unmarried, and under age, the gift is to the two sisters, and not to him: if he lives to be twenty-one, the gift is to him, and not to them. The falling out of the event fixes the destination of the property. There are no successive interests—first to the son, and afterwards to the sisters, or first to them, and afterwards to him. The gift is only one, and is complete, and the event simply fixes who shall be the taker. It is clear that in all such cases of personal property bequeathed, there is no vesting of an interest in, nor any sort of possessory right taken by, any of the contingent legatees, until the event shall happen. (*Andrew v. N. Y. Bible, &c., Soc.*, 4 *Sandf.*, 156; *Worthington on Wills*, 98, 98; *Toml. Dict.*, "Condition;" *Caw v. Robertson*, 5 *N. Y.*, [1 *Seld.*], 125; *Lister v. Bradley*, 1 *Hare*, 10, 13; *Atkinson v. Turner*, 2 *Atk.*, 41; 1 *Jarm. on Wills*, 760; *Taylor's Preced. of Wills*, 600.)

II. The contingency of the devise is precisely the same as the contingency of the bequest. 1. It is true, that while the common law defeated a future freehold estate, given conditionally, if the particular estate ceased before the prescribed event occurred, the courts were inclined to help the contingent devisee by a favorable construction, and to seek for something to show an intention of the testator that his gift should not be deemed a contingent remainder, but an immediate estate, vested at once and subject only to the risk of being defeated by the subsequent adverse happening of the event. Where, however, the words properly express a contingency, the chance of a future uncertain event—"si contingent," &c.,—nothing but proof of a different intention can prevail. 2. In the like spirit the courts have been astute to criticize the words used to express a contingency. (*Doe v.*

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Moore, 14 *East*, 601.) But the words used in the present case will bear no flexion. The word "if" is the best and perfect expression of the condition precedent. 3. The courts, however, have not been uniform nor constant in their treatment of contingent devises. (1 *Jarm. on Wills*, 743, 744; *Humph. on Real Prop.*, 260; *Jackson v. Winne*, 7 *Wend.*, 47, 52; *Gifford v. Thorn*, 1 *Stock., N. J.*, 702; *Roome v. Phillips*, 24 *N. Y.*, 463.) 4. But all the struggles of the courts, in this State, to convert contingent remainders into vested remainders defeasible by subsequent events, in order to avoid the rigid rule of the common law as to future estates in freehold, are no longer necessary. (1 *Rev. Stat.*, 723, §§ 10, 24, 25.) 5. Nor is there any thing in this will, nor in the surrounding circumstances, showing an intention of the testatrix to give her son a vested estate during his minority. 6. The fact that the personal bequest is clearly contingent, must determine the meaning and force of the same words when they express a devise of land. The two kinds of property, real and personal, not only are given here by like words, but are given by one and the same sentence *uno flatu*.

III. The contingent remainders to the son and to the sisters are future estates, to take effect in the alternative. (1 *Rev. Stat.*, 724, § 25.) Neither of these remainders comes after the other or follows the other. The happening of the event, either way, carries the estate forever to one of the two alternative takers. There is but one estate in the contemplation of the testatrix, namely, the remainder awaiting the happening of the prescribed event, then to take the direction which such happening must cause (either to him or to them), and to go entire and absolutely in that direction. The whole of the provisions for this remainder must stand or fall together; and the disposition of the land, with reference to the law for suspending estates, is one and indivisible; the whole disposition of the fee after the husband's death must stand or fall together. The question as to which is the next eventual estate, during the period when these rents arose, comes to a ready solution. Neither of them can be said properly to

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precede the other; for whenever either one of them commences, the other fails altogether. The order of describing them in the will has nothing to do with the question, which may soonest take effect. The commencement of the sisters' remainder, if it ever occurs, must take place before the time when the son's remainder can, by possibility, commence. Thus, of the two estates in remainder, that of the sisters is necessarily the nearest; and, therefore, they are the persons "presumptively entitled to the next eventual estate." (1 *Rev. Stat.*, 726, § 40.) During the son's minority, their expectant estate is the next eventual estate. The statute gives to them the rents for the intervening period. (1 *Rev. Stat.*, 726, § 40.) If, however, the whole fee in remainder should be treated as a single eventual estate, contingent in respect of the persons to take it, then the rents would go to the two alternate takers equally, as the persons entitled to the next eventual estate.

DEXTER A. HAWKINS for Contestant.

I. Louisa W. Cuming, the mother of the intestate, after a life estate to her husband, left a remainder in fee to her son, the intestate, defeasible on his death without issue before arriving at the age of twenty-one. This remainder in fee vested in the intestate on the death of his mother; and on the death of his father, the intestate entered into the possession of his estate. The intestate took under the will a vested remainder, and not a contingent remainder. (*Roome v. Phillips*, 24 *N. Y.*, 463; *Boraston's Case*, 3 *Coke R.*, 19; *Goodtitle v. Whilby*, 1 *Burr.*, 228; *Edwards v. Hammond*, 3 *Lev.*, 132; 3 *Term. R.*, 365; *Bromfield v. Crowder*, 4 *Bos. & Pul.*, 313; 4 *Burr.*, 313; *Roe v. Briggs*, 16 *East*, 411; *Doe v. Moore*, 14 *Ib.*, 601; *Jackson v. Beach*, 2 *Johns. Cas.*, 399; *Hill. on Real Prop.*, 3 ed., 524, §§ 32, 33, 46, 47.)

II. The income, from the day of the death of his father to his own death, of the property devised to intestate by his mother, became his absolutely; and on intestate's death, the balance unexpended went to the administrator as assets of

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the intestate. (*Snow v. Poulden*, 1 *Keen.*, 186; 1 *Jarm. on Wills*, 743.)

III. Assuming that the intestate took a contingent remainder, instead of a vested remainder, still the income of the estate from the day of his father's death up to his own death vested in him absolutely, as it accrued, and the balance, \$8,212.06, must be accounted for by the administrator, and distributed to the next of kin. 1. This devise, then, is clearly a contingent remainder. It could not vest, even if otherwise good, until the boy's death. We have two contingent remainders, limited upon a life estate—in other words, two expectant estates; and the boy would be “the person presumptively entitled to the next eventual estate.” 2. At common law, the termination of the precedent life estate before the happening of the contingency would defeat absolutely the contingent remainders, and the estate would go to the heir-at-law. (2 *Blackst.*, 171.) 3. By 2 Rev. Stat., 725, § 34, the contingent remainders vest, when the contingency happens, to the same extent as if the precedent estate had continued up to the happening of the contingency. 4. But by section 40, the intestate was presumptively entitled to the next eventual estate. Until he was dead, no other party had any claim. (*Haaxton v. Corse*, 2 *Barb. Ch.*, 518.) By section 25, two or more future estates may be created to take effect in the alternative; so that if the first in order shall fail to vest, the next in succession shall be substituted for it, and take effect accordingly. The son's is “the first in order:” the sisters' can never come into existence except on the death of the son under age without issue. During the son's minority, the person competent to take the income is not the sister, for she is not the first in order. If she could not take it as it accrued, she cannot take it now. This income vested absolutely somewhere, as it accrued; otherwise there would be an accumulation.

RICHARD O'GORMAN, for Contestant, *Anne Briccos*,

Cited *Jarman on Wills* (726-758); *Burton on Real Prop.* (9 n. 25, 296, 802); *Kane v. Astor* (5 *Sandf.*, 467); *Smither*

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v. *Willock* (9 *Ves.*, 233); *Peyton v. Bury* (2 *P. Wms.*, 626); 4 *Kent's Com.* (205); *Furness v. Fox* (1 *Cush.*, 134); *Bromfield v. Crowder* (4 *Bos. & P.*; 313); 2 *Swan.*, 442; *Andrew v. N. Y. Bible, &c., Soc.* (4 *Sandf.*, 156); *Jackson v. Winne* (7 *Wend.*, 47); *Caw v. Robertson*, 5 *N. Y.* [1 *Seld.*], 125).

THE SURROGATE.—I. The fee of the real estate vested under the will in the intestate as a present gift, subject to the life estate of his father.

II. The rents due and collected by the guardian, during the lifetime of the intestate, belonged to the intestate. But rents collected February 1st, 1860, after the death of the intestate, go with the fee to Mrs. Kelso.

III. The balance of the proceeds of the personal estate (\$2,053.21), having come from the intestate's mother and her relatives, goes to Mrs. Kelso, either as next of kin of the mother or by the will.

The interest on the balance of rents paid to the administrator by the guardian, and belonging to the intestate's estate, is to be accounted for. The said balance (\$8,212.06) and the interest (\$1,734.45), are assets in the hands of the administrator, to be divided among the three next of kin.*

NIAGARA COUNTY—HON. M. M. SOUTHWORTH, SURROGATE—1859.

LLOYD v. LLOYD.

In the Matter of the final Settlement of the Accounts of JOHN LLOYD, administrator, &c.

An inventory is an act of the administrator or executor, to the correctness of which he is sworn, particularly as to all claims against himself; and,

* On an appeal to the Supreme Court, Second District, the Surrogate's decree in this case was affirmed, except as to an allowance to counsel. November Term, 1868.

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therefore, if an administrator inventories, among the assets of the intestate, a promissory note, executed by himself to the deceased, without making any claim of set-off to the same in the inventory, this circumstance, unless satisfactorily explained, is, in connection with other adverse facts, suspicious; and, in a case where it appeared from the preponderance of testimony, that the items of the account constituting the set-off, existed before the delivery of the note,—*Held*, that the omission was evidence against the same, independent of the legal presumption of a settlement between the parties as to all prior matters.

Held further, that this rule applies to the whole demand, in a case where the claim of the administrator exceeds the amount.

Whether, as to a demand, thus inventoried, the administrator or executor is not estopped from setting up a defence in bar, such as satisfaction, payment, &c., which operates to discharge or extinguish the claim—*Query?* Books of account, introduced as evidence of indebtedness of the deceased, are not conclusive. They should be sustained by other corroborating proof, as far as possible; and where kept in the form of a ledger, although a book of original entries, and some of the charges are written on erasures, and others appear to have been altered after they were first made, but little credit is due them.

The facts are fully stated in the opinion.

T. M. WEBSTER, *for Administrator.*

H. GARDNER, *for next of kin.*

THE SURROGATE.—In this case, the administrator, who is a son of the decedent, presents an account against the estate to the amount of \$941.72, claiming a balance due him of \$425.55. The account consists of demands for work and labor, from time to time, on the farm of the intestate, and for various articles of personal property sold to him during his lifetime, and is made up of numerous items. The dates of the charges commence in March, 1839, and end in April, 1852, and, with the exception of an interval of a year, the items extend through the whole time; and the credits given, also extend through the same period. The intestate died in March, 1855. The claim is controverted by the next of kin, and a mass of evidence has been submitted for and against it. The administrator mainly relies upon an account-book of original entries kept by him, which was admitted in evidence, after the proper foundation was laid, to sustain the

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demand. The question of the admissibility of this kind of evidence as against the estates of deceased persons was not raised, nor that any part of the account was barred by the Statute of Limitations. A review of the testimony in detail is unnecessary, as there are certain facts, in reference to which there is no conflict of proof, decisive of the matters in issue. In the first place, although the account-book of the administrator has been admitted in evidence, it is far from being satisfactory. It is kept in the form of a ledger, and the accounts against the deceased are in pages distinct from the accounts against others in the same book. Many of the items are written on erasures ; others appear to have been altered after they were first entered ; and one whole page, from the appearance of the ink and the writing, looks as if it had been written over at the same time, although the charges are of different dates. On a close inspection of the book, I think but little credit is due to it ; and with all the suspicious marks upon it, referred to, it comes fully within the language of Chief-justice PENNINGTON, of New Jersey, with respect to this kind of proof, directed more particularly against books kept in this form : " Books kept in this way open the door for the grossest frauds and injustice, and the most scandalous iniquity is daily practised under it. I am clearly of opinion myself, that books kept in this way ought never to be suffered to appear in a court of justice. But the law is otherwise, and they must be admitted the same as other books, when proved to be the ordinary books of account of the person offering them, in which he makes his original entries. But they ought to be considered as the most suspicious testimony that can be offered—little better than the declarations of the party in his own favor. Entries are frequently made after the controversy commences, and accounts opened years after the transactions have taken place which gave rise to them." Since the admission of parties as witnesses in their own behalf, where both are living, there is less danger from the introduction of this species of evidence than formerly ; and perhaps the reasons for receiving it have been entirely

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removed, in such cases. But where the party whose estate is sought to be charged by it is dead, extreme caution, as heretofore, should be exercised by a court or jury, in determining its weight and credibility. Other evidence in corroboration of the charges should be given, as far as possible. In this case there is no such proof. On the contrary, there are certain undisputed facts, to which I will briefly refer, which, together with the suspicious appearance of this account-book, satisfy me that the claim should be rejected. It is shown that soon after the death of the intestate there was a meeting of the children and next of kin of the deceased at his late residence, to effect a voluntary distribution of the property without administration, in order to avoid expense and delay. The administrator, as one of the next of kin, attended this gathering, and participated in the discussions. It was there stated, in his presence, that there was no difficulty in the way of this course, as it was not known that the deceased owed any thing. No claim was made by him, at this time, against the estate. It appears, also, that on another occasion, before administration, when one of the next of kin proposed to the administrator to divide the notes and accounts of the deceased equally among the children, he said nothing as to his having any demand. A witness, whose credibility cannot be doubted, testifies that before letters were issued to the administrator, he had a conversation with him respecting the indebtedness of the decedent, and that the administrator remarked that "he didn't think the estate owed much of any thing to anybody;" and in another conversation, about the same time, in reply to a remark made by the witness that he did not believe the deceased owed his children much, the administrator said, "he didn't know—there might be some debts he didn't know of." The witness says that the administrator made no claim against the estate in either of these interviews.

There is still another circumstance, the act of the administrator, about which there can be no doubt, which I deem important to be mentioned. As administrator of the estate, it

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was his duty to make a full, accurate, and truthful inventory of the assets of the deceased, in which he was bound to set forth all demands against himself due the intestate. An inventory was made in this case, and verified by the administrator in the manner required by law; and in it, he enumerated, among the assets, a demand against himself, in the following form :

" Due Bill against John Lloyd, \$21.00."

" (Not dated.)"

There is no note or entry in the inventory, setting forth that he had any set-off or defence to the demand. The form of this due-bill, and the time of its delivery, are subjects of proof. It passed into the hands of the administrator with the other effects, but is shown to be lost. It appearing that it was executed and delivered by him shortly before the death of the intestate, and subsequent to the date of the last item of his account, he attempted to preclude the legal presumption of a settlement of all prior matters between him and the deceased, arising from this circumstance, by showing that the due-bill, on its face, purported to have been given for wheat. But the testimony for this purpose was unsatisfactory and insufficient; and so far as this point is concerned, the inventory was not changed, and the presumption unaffected, and is applicable to the whole demand of the claimant. Independent of this presumption, however, I think that the omission of the administrator to make any claim of set-off or defence to the due-bill in the inventory, of which no explanation has been given, is evidence against him. An inventory is the act of an executor or administrator, to the correctness of which he is sworn, particularly as to all claims against himself belonging to the estate. It is unnecessary, in this matter, to decide that if an administrator or executor should inventory a demand against himself, without making any claim of defence to it in the inventory, he would be estopped from setting up a defence in bar to the same, like payment, satisfaction, &c., which operate to dis-

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charge or extinguish the demand. But it does not admit of a question that, unexplained, such an omission would be conclusive evidence against the administrator. There is a difference, however, between such a defence and a set-off. The administrator is not at liberty to adjust and apply such a demand in abatement of a claim of the estate against him, but must, either on final settlement or in a special proceeding before the surrogate, prove the set-off; and therefore, in such a case, this omission would have less weight. Still, I cannot but regard it as evidence showing that, at the time this inventory was made, the administrator did not think of setting up a claim against the note or the estate. It seems to me that no man acting in this capacity, while setting forth a demand against himself to which he had a legal or equitable defence, would fail to qualify it in some form by a statement of his claims against it. On returning the inventory, he made oath, in accordance with the statute, that this demand was a "just claim" of the estate against him to its amount, in the full knowledge that this court possessed jurisdiction to determine all legal and equitable defences to the same in his behalf, on a final accounting, or on proceedings before final accounting, in which the inventory would be evidence against him; and yet he failed to accompany it with any counter-claim whatever. This neglect on his part, while thus engaged as a trustee, in presenting the true condition of the estate committed to his care, to set forth a matter necessary to a full understanding of it, has a significance which ought not to be overlooked, especially as an unfavorable interpretation of it is in entire harmony with all the acts and declarations of the administrator as to this demand, and the other testimony in this case.

With all this direct and circumstantial evidence against it, I have no hesitation in rejecting the whole account, and adjudging the amount of the due-bill, with interest, a valid debt against the administrator.

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NEW YORK COUNTY—HON. CHARLES P. DALY, ACTING SURROGATE*—
August, 1862.

LYNES v. COLEY.

In the Matter of the Estate of SANDFORD COLEY, deceased.

It is a general rule, that a beneficiary who seeks the payment of a legacy must resort to the jurisdiction of the State or country where the testator was domiciled at the time of his death, where letters testamentary were originally granted; and that payment of it will not be decreed by a foreign tribunal, out of assets situate within its jurisdiction which are under administration ancillary.

But, *it seems*, that where it is shown that no injury can arise to creditors or legatees, from decreeing the payment of a legacy, the surrogate may require its payment out of assets situate within the jurisdiction where the legatee resides.

The testator, at the time of his death, was domiciled in Connecticut, in which State his will was admitted to probate. The executor afterwards obtained letters ancillary here, to reach effects in this State.

Held, that the executor could be called upon to account here only for such assets as the testator left in this State, and which were here at the time the letters ancillary were granted.

The accounting of the executor here, is to be carried no further than may be necessary to enable our own citizens to secure their claims out of assets situate within our own jurisdiction; after which, and the payment of expenses, the further administration of the assets is to be left to the jurisdiction where the estate is to be finally closed.

ALEX. W. BRADFORD, *for Executor.*

JOHN J. TOWNSEND, *for Legatee.*

THE SURROGATE.—The testator, at the time of his death, was domiciled in Connecticut, and his will admitted to probate in that State, in August, 1857. Afterwards, in November, 1858, his executors obtained letters ancillary in this court, to reach effects in this State. He has been called to

* Surrogate WEST having died during his term of office, Judge DALY, F. J., New York Common Pleas, discharged the duties of surrogate from July 8 to December 1, 1862.

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account by a legatee resident here; and the executor, having filed his account, the legatee insists that there are railroad bonds, stocks in various corporations, and State bonds, other than those of the State of Connecticut, not included in the inventory filed here, in respect to which he claims the right to examine the executor, with the view of ascertaining whether any of them, or the proceeds of any of them, have been brought within this jurisdiction since letters were granted here; to which the executor objects, upon the ground that he can be called to account here, only for such assets as the testator left in this State, and which were here at the time when the letters ancillary were granted; and that with respect to all other assets, he is to account in the jurisdiction where they are situate, or in the State of Connecticut, where the testator was domiciled at the time of his death, where the will was originally admitted to probate, and where the estate is now in the course of administration.

I think the objection is well taken. Our statute provides that in all cases where persons, not inhabitants of this State, shall die, leaving assets in the State, and letters testamentary have been granted by competent authority in any other State of the Union, the person so appointed, on producing such letters, shall be entitled to letters of administration in preference to all other persons. (3 *Rev. Stat.*, 159, § 31, 5 ed.)

The design of this provision was to enable an executor, who had obtained letters in another State, to possess himself lawfully of the assets which the testator had left in this State; and for those assets he must account here. If, however, he has, before letters ancillary were granted to him, collected debts in this State, or otherwise previously possessed himself of property which the testator left here, he is not to account here for such assets, but to the jurisdiction where the will was originally admitted to probate, and where the estate is to be generally administered. (*Parson v. Lyman*, 20 *N. Y.*, 103; 28 *Barb.*, 564; 4 *Bradf.*, 268.)

The object of the legatee in the present case, by the exam-

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ination which he wishes to institute, is to ascertain, not merely what assets were left by the testator in this State, but whether the executor has not, since letters ancillary were granted to him, brought here assets belonging to the estate,—with the view of requiring him, if such should be the fact, to account for them here; and this, in my judgment, the legatee cannot do. If they were not collected or realized in this State, by the executor, after he took out letters here, he is to account for them in the jurisdiction in which they were situate at the time of the testator's death; or in Connecticut, where the testator's estate is in the course of general administration.

As the term "ancillary" denotes, the administration here is, in a certain sense, subordinate to the more general administration in Connecticut.

The assets of foreigners, says STORY, are collected under what is called an ancillary administration, because it is subordinate to the original administration, taken out in the country where the assets are locally situate. (*Story's Eq. Jur.*, § 583; *Story's Conf. of L.*, 512-519, ch. 13); and this term was employed by Chancellor WALWORTH, in *Vroom v. Van Horne* (10 Paige, 556), as descriptive of the kind of administration for which provision had been made by our statute.

By a principle universally recognized, the interpretation of the testator's will, and the distribution of his estate, are regulated by the *lex domicilii*, and the accounting of the executor here is to be carried no further than may be necessary to enable our own citizens to secure their claims out of assets-situate within our own jurisdiction; after which, and the payment of expenses, the further administration of such assets, it is generally conceded, is to be left to the jurisdiction where the estate is to be finally closed.

If the person calling the executor to account was a resident creditor here, I should feel disposed to go very far in assisting him to ascertain, by a proceeding like this, what portion of the testator's estate was situate here, irrespective of the circumstances under which it came within our jurisdiction;

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that he might have whatever remedy, for the payment of his debt, our tribunals could afford him. But a legatee who is a partaker of the testator's bounty, may very well be remitted to the jurisdiction where the estate is to be generally administered.

It has in several cases been held that the beneficiary who seeks the payment of a legacy, must resort to the jurisdiction of the State or country where the testator was domiciled at the time of his death, where letters testamentary were originally granted; and that the payment of it will not be decreed by a foreign tribunal, out of assets situate within its jurisdiction, which are under administration ancillary. (*The Selectmen of Boston v. Boylston*, 2 Mass., 384; 9 *Id.*, 337; *Fay v. Haven*, 3 Metc., 109-114; *Jennison v. Hapgood*, 10 Pick., 77.) This is a general rule;—a correct one, to prevent all possibility of conflict of jurisdiction to secure the creditors, wherever situate, against losing any part of their claim through a payment to legatees; and generally to prevent the doing of any act, on the part of independent jurisdictions, which might cause a different result in the disposition of his estate from what the testator intended. As a general rule of comity, it recommends itself by its eminent justice and propriety; but still, like every other rule, it has its exceptions. If the bulk of the testator's estate is within the jurisdiction where administration ancillary has been granted, if there is nothing in the will to indicate the possibility of any question arising under it, and debts have been paid, or the amount of them has been fully ascertained by the ordinary course of procedure in both jurisdictions, and it is apparent to the court that no injury could possibly arise to creditors or legatees by decreeing the payment of a legacy, then there is no reason why the payment of it should not be decreed out of assets situate within the jurisdiction where the legatee resides.

No rule of comity demands that the legatee, in such a case, should be turned over to the tribunals of the State or country where the testator was domiciled at the time of his

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death. Nothing has been laid before me to show that the application of the legatee, in the present case, presents such an exceptional instance, and I shall therefore hold that the executor is not required to account generally here for assets which have been returned by him, and included in the inventory which he has filed in Connecticut; but that he is to account for such assets only as may have been collected or realized by him in this State, since the letters ancillary were granted to him.

NEW YORK COUNTY—HON. CHARLES P. DALY, ACTING SHERIFF—
October, 1863.

HAMLIN v. OSGOOD.

*In the Matter of the Distribution of the Estate of ASHER P.
HAMLIN, deceased.*

The testator devised all his estate to his executors in trust, to sell it in such parcels, and at such times, as they should think proper; and authorized them, until such sales were made, to receive the rents and profits. He then directed, that upon the converting of all his estate, real and personal, into money, it should be divided into ninety equal parts, specifying how many parts were to be paid to the several legatees. He also directed that in case of the death of any legatee "before the division of my estate, leaving descendants," the share of such legatee should go to said descendants, in such portions as they would be entitled to, if such deceased person had died intestate, fully possessed of the same.

Held, 1. In view of the discretion allowed to be exercised by the executors, the court will not presume that the testator contemplated the division of the whole estate at an earlier period than it really occurred, except where unreasonable delay or an unwarrantable abuse of the trust are shown.

2. The event upon which the bequests were limited, was the final division of the testator's estate; and the legacies did not vest until that event took place. Therefore, when one of the legatees died before the final division took place, the limitation over to his descendants took effect at his death; and his share should be paid to them, and not to his administrator.

3. The widow of said legatee was not, therefore, entitled to any por-

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tion of her husband's share. She is not included in the term "descendants," and can take no part in the distribution as such.

Brothers and sisters cannot take under the term "descendants." The term does not mean next of kin, or heirs at law generally, but it means the issue of the body of the person named of every degree, as children, grandchildren, and great-grandchildren.

The testator, Asher P. Hamlin, died August 11, 1858, and by his will devised and bequeathed all his real and personal estate to his executors, upon trust, to divide the whole proceeds into ninety equal parts; and, among other bequests, to pay and deliver to his niece, Lydia Day, eight of the said ninety equal parts. To his sister, Jerutha Day, ten of the said ninety equal parts. To his nephew, James D. Hamlin, five of the said ninety equal parts. To his grand-nephew, Asher P. Hamlin, Jr., five of the said ninety equal parts. And directed that, "in case any of the persons for whom provision is herein made shall die before me, or before the division of my estate, leaving descendants, such descendants shall have and take such share and portion of my estate as such deceased person would, if he or she had lived, been entitled to,—such portion to be divided among such descendants in such shares as they would be entitled to if such deceased had died intestate, fully possessed of the same."

The said Lydia Day died before the testator, without leaving issue, never having been married, and leaving no parent.

The said Jerutha Day died before the testator, leaving her children Lydia Day (above mentioned), Eliza Crippen, and Lewis Day; and her grandson, William H. Day, the only child of her deceased son Asher.

The said James D. Hamlin died after the testator, leaving him surviving, his widow Lucy Hamlin, and his children Emily B. Osgood, Francis S. Hamlin, and Caroline B. Hamlin.

The said Asher P. Hamlin, Jr., died after the testator, intestate, without leaving issue, he never having been married. He left him surviving, his father, Samuel S. Hamlin, to whom were granted letters of administration upon his estate.

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EDWARD DEWITT, *for the Administrator.*

W. L. WORDEN and P. G. CLARKE, *for Emily B. Osgood.*

BIRDELL & MANCHESTER, *for other Next of Kin.*

THE SURREGATE.—Lydia Day having died before the testator, leaving no descendants, the legacy in her case lapsed. Neither her brother nor sister can take under the term descendants. Descendants does not mean next of kin, or heirs at law generally, as these terms comprehend those as well in the ascending as in the descending line, and collaterals; but it means what the word obviously imports, the issue of the body of the person named, of every degree—as children, grandchildren, and great-grandchildren. (*Crossy v. Clare, Amb.*, 397; *Le Gard v. Haworth*, 1 *East*, 120; 1 *Jarm. on Wills*, 32; 2 *Williams on Ex.*, 811, 812, 2 ed.) Lydia Day, therefore, having died without issue, the contingency contemplated by the testator—her death before him, leaving descendants who should be living at the time of his death—never occurred, and the legacy has consequently lapsed.

The legacy to Jerusha Day, who died before the testator, did not lapse, as she left descendants who were living at the time of his death. They take it in equal portions—the grandchild a third, and the children each one third.

Asher P. Hamlin, Jr., the grand-nephew, survived the testator, and the legacy to him vested at the testator's death. (*Van Wyck v. Bloodgood*, 1 *Bradf.*, 154; *Deane v. Test*, 9 *Ves.*, 147, 152; *Gaskell v. Harman*, 6 *Id.*, 159; 11 *Id.*, 489; 1 *Roper on Leg.*, 553, 555, 601.) He received his proportional part on the first distribution, and died before a final division was made. It is claimed that there was, by the first distribution, a division of the estate within the terms of the will, and that after he had received that proportional, his interest in the whole became absolute, and could not be divested. I do not think so, but think that the testator meant the complete and final division of his estate. But the point is not one that it is material to discuss; for as Asher P. Hamlin, Jr., died unmarried, and left no descendants, the

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contingency contemplated by the testator, and which alone could divest the undistributed residue, never occurred, and it consequently goes to his administrators.

James D. Hamlin was living at the time of the testator's death. The legacy to him consequently vested,—subject, however, to its being divested if he died before the division of the testator's estate, leaving descendants. He died before any division was made, leaving descendants, and his share goes to them. The words of the will are: "In case any of the persons for whom provision is herein made, shall die before me or before the division of my estate, leaving descendants, such descendants shall have and take such share and portion of my estate as such deceased person would, if he or she had lived, been entitled to."

Some difficulty has been experienced in construing a provision like this, by which a legacy is given to others, if the legatee should die before a certain event takes place, the time when it will take place being uncertain. The event may be delayed by causes unforeseen by the testator, or by the neglect or misconduct of executor or trustee.

In *Hutchinson v. Mannington* (4 Bro. C. C., 291, note; 1 Ves. Jr., 366), the testator left a legacy to be paid out of a fund in India, with the proviso, that if the legatee died before he received it, it should go to others. The legatee died before he received it, and LORD THURLOW was of the opinion that the provision, "before he received it," was too vague and uncertain; and as the testator had neglected to fix any definite time, such as a year (the term given by law for an executor to make payment), he held the legacy to be vested absolutely from the death of the testator. He put the case of similar proviso upon the sale of real estate, and said the court would not inquire when it could or ought to have been sold, but, for the purpose of construing such a provision, would consider it as sold the moment the testator is dead.

This decision, however, has never been followed. LORD ELDON considered it erroneous (*Sitwell v. Bernard*, 6 Ves., 520); and the case now is authority for nothing more than

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that the intention of the testator, in provisions of this kind, must be manifest and clearly expressed. (*Laro v. Thompson*, 4 *Russ.*, 92, 100.)

In *Elwin v. Elwin* (8 *Ves.*, 547), the executors were directed, upon a certain contingency, to sell the testator's real estate and divide the proceeds among his nephews; but that if any of them should die before "the sale of his estate was completed, that then the share of the nephew so dying was to be otherwise disposed of." One of the nephews died before the sale was completed, and SIR WILLIAM GRANT, Master of the Rolls, held that no interest vested, until the sale was completed, in the nephew. He said: "The testator clearly meant to give the trustee a discretion, which the nature of the trust, a trust to sell, requires. In the first instance, it is left to them to judge how soon. He does not suppose, nor will the court presume, that they will abuse the discretion placed in them; and if they do not, he clearly means that the interest shall vest at the completion of the sale, and not before. It is only in the case of their negligence procrastinating the sale, that such a presumption can be made. . . . The court is desired to presume that he did not mean what he has said, or, at least, did not understand the meaning of what he so anxiously expressed."

In *Laro v. Thompson* (4 *Russ.*, 92), the testator died in India, leaving to his father, in Ireland, 5000 pagodas, with the proviso, that if his father should die "before the money was paid into his hands," then he gave it to his brother and sister. The father died before receiving the legacy, and it was held to be the intention of the testator, that the gift should vest in the legatee, when actually remitted to him, unless the remittance was delayed through the want of reasonable diligence on the part of the executors.

It may be collected from these cases, that when the testator may fairly be presumed to have contemplated that the event upon which he has limited the bequest would occur within a definite period, and the legatee lives beyond the period, but dies before the event actually takes place, that

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the legacy will be vested in him absolutely. But if it may be gathered from the will, that the testator had no definite idea in his mind of the time within which the event would take place, and has clearly expressed his intention that the legacy shall be divested, if the legatee should die before the happening of the event; then the time that may have transpired is immaterial, and if the legatee die before the event occurs, the legacy goes to those to whom it is limited over.

In the present case, the testator devised all his real and personal estate to his executors in trust, to sell and dispose of in such parcels, and at such times, and upon such terms as they should think proper; and authorized them, until such sales were made, to let his lands and tenements, and to receive the rents and profits thereof. Here there was a very large discretion, and one with which the courts would not interfere, unless there was an unreasonable delay or an unwarrantable abuse of the trust. He then declared, that upon the converting of all his real and personal estate into money, it should be divided into ninety equal parts, specifying how many parts were to be paid to the several legatees. In connection with the discretion with which he clothed his executors, it is manifest that he contemplated that it might not be possible or judicious to convert his estate at once, and accordingly he made provision that the executors might, in their discretion, from time to time, make payments out of the proceeds of his real and personal estate, among the legatees, on account of their several shares and portions, before a final payment and distribution of his estate. He contemplated, in fact, and authorized, exactly what has taken place—the gradual conversion of his estate, and a distribution of it from time to time, in the discretion of his executors. All this shows very clearly that he had no definite idea of the time within which what he intended should be done, but that he meant to leave it to the discretion of his executors.

I have nothing before me to show that this discretion was not properly exercised, or that there was unreasonable delay. But one of the executors qualified, and he died in four-

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teen months after letters testamentary were granted, without having filed an inventory, and without executing any of the trusts of the will. There was a delay here in not filing an inventory, which must be done in three months after the granting of letters, unless the time is extended by the surrogate. The statute also provides that the general legacies shall be paid after the expiration of a year from the time of granting letters. (3 *Rev. Stat.*, 3 ed., 171, 177, §§ 16, 50.)

In sixteen months after the testator's death the first distribution was made; and in thirteen months after, the administrator with the will annexed, who had also been appointed trustee, rendered his final account, and had it adjusted and settled. Now the whole of this time, two years and nine months from the testator's death, may have been a reasonable period, for all that I know, within which to convert the whole estate, which was a very large one, into money. I cannot indulge in any presumption to the contrary. I cannot, in view of the discretion which the testator allowed to be exercised, presume that he must have contemplated that it would have been done at an earlier period, or before the time when James D. Hamlin died, which was fifteen months after the death of the testator; or presume that he must have contemplated that the whole estate would be ready for division at the end of the year, which the statute fixes as the period within which general legatees are to be paid: and if I cannot presume that the testator contemplated that his estate would be divided before the period when James D. Hamlin died, then I must hold that he died before the event which the testator had in view, and that the limitation over to his descendants took effect. This was the construction put upon this provision in the will by the administrator. The first distribution having been made after James D. Hamlin died, the administrator paid over the proportional part to which he would have been entitled if living, to his descendants; and, in my judgment, he was right in so doing.

James D. Hamlin left a widow and three children, and on the part of the widow it is insisted that if his share is not to

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go to his administrator, but to his descendants, she is still, by the express terms of the will, entitled to share with them in the distribution of it, the same as if James D. Hamlin had died, possessed of it, intestate. The will, after providing that if any of the legatees die before the division of the estate, leaving descendants, the share of the legatee shall go to the descendants, declares that it shall "be divided among such descendants, in such shares as they would be entitled to if such deceased person had died intestate, fully possessed of the same." Under the latter provision the widow claims that she is entitled to one-third, the same as if James D. Hamlin had died possessed of this share, intestate. But I cannot assent to any such construction. The intention of the testator is, in my judgment, plain and obvious. The share of James D. Hamlin, in the event of his death before the division of the estate, is given expressly to his descendants, and to nobody else. It is, by the terms of the will, "to be divided amongst" them, and the clause that it is "to be divided amongst such descendants, in such shares as they would be entitled to if such deceased person (James D. Hamlin) had died intestate, fully possessed of the same," means simply equality of division among them; that is, a division *per stirpes*, or such a division as the Statute of Distributions would make among them of their proportional part, in case of intestacy. There is nothing in the language of the testator to indicate any intention that the wife of James D. Hamlin was to have one-third of his share, and his descendants two-thirds. As I have said, they alone are named as those among whom it is to be divided in the event of the contingency contemplated, and she is not embraced under the term "descendants."

In *Nichols v. Savage* (cited in 1 *Ves.*, 53), it was held that a gift to next of kin or relations did not include a husband or a wife.

In *Davies v. Bailey* (1 *Ves.*, *Sr.*, 84), the testator gave the residuary personal estate to his wife for life, and the capital at her death to "such of his relations" as would be entitled to it by the Statute of Distributions; and it was held by Lord

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HARDWICKE that the executor of the wife was not entitled to any share of the principal residue.

In *Worseley v. Johnson* (3 Atk., 758), the testator devised certain lands to his wife for life, and at her death directed them to be sold, and the proceeds to be divided among his relations, according to the statute. It was held that the wife's executor was not entitled to any part of the produce of the sale with the next of kin.

Garrick, the actor, after providing by his will for the payment of certain bequests and legacies, disposed of the residue as follows: "And in case, after payment of all the said legacies, bequests, and expenses, there shall remain any surplus money or personal estate, I direct the same to be divided amongst my next of kin, as if I had died intestate." The question was, whether Mrs. Garrick, the widow of the testator, was entitled to a share of the surplus under this last clause; and it was held by LORD ELDON that she was not. (*Garrick v. Lord Camden*, 14 Ves., 372.)

These cases are decisive on the point that where a bequest is left to a man's next of kin, relations, or descendants, to be divided among them, as if he had died intestate, his widow is not included, and can take no part in the distribution of it.

This embraces all the questions that have been submitted to me for decision, and a decree must be entered accordingly.

NEW YORK COUNTY—HON. CHARLES P. DALY, ACTING SURROGATE—
November, 1862.

DELMOTTE v. TAYLOR.

In the Matter of the Estate of GEORGE W. MILLER, deceased.

The deceased was in his last illness, suffering from an incurable disease; he had just made his will, and every thing tended to show that he was in present apprehension of death. *Held*, that under such circumstances, a gift of his horses, furniture, wearing apparel, and watch, was a gift *mortis causa*, and not *inter vivos*.

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The policy of the law is against gifts *mortis causa*; and to sustain them, the most clear, circumstantial, and satisfactory proof will be required.

To constitute a valid *donatio mortis causa*, there must be, if the gift is by parol, an actual delivery and acceptance of the thing, so far as it is possible. The mere fact that it has passed into the possession of the donee, even by the act of the donor himself, is not enough.

However apparent the intention of the deceased to make a gift, such intention of itself is unavailing to sustain it.

The deceased, in his last illness, expressed a desire to his daughter that she should have his carriage and horses, but did not request her to take possession of them, nor direct the stable-keeper to deliver them to her; nor did it appear that there had been any actual transfer or change of possession, though they were used by her afterwards, and the coachman received his orders from her.

Held, not such a delivery by the donor to the donee, as was necessary to complete the gift.

So, where the deceased gave his daughter the furniture in his rooms, the keys to which were given her by her husband, and she subsequently removed the furniture to her residence, though nothing else appeared showing that she took possession of it with the donor's knowledge and assent,—*Held*, not sufficient to consummate the gift. The fact that the furniture was in the donee's possession before the donor's death, is not, of itself, sufficient to warrant the presumption that there was an actual delivery. A mere taking possession is not sufficient. It should appear to have been done with the knowledge and acquiescence of the donor.

On the accounting of Alexander Taylor, and Halsey W. Knapp, executors of the last will and testament of Geo. W. Miller, objections to the account were filed by Mary J. Delmotte, Sneckner, and others, next of kin, on the ground that certain furniture, a gold watch, and horses and carriage, belonging to the estate, were not accounted for. It was claimed, on behalf of the executors, that the articles specified had been taken possession of by Mrs. Taylor, a daughter of the testator, under a gift to her, by the testator, shortly before his decease.

CHARLES F. SANFORD, *for the Executors.*

WM. E. CURTIS, A. R. DYETT, and E. W. DODGE, *for Next of Kin.*

THE SURROGATE.—All the other questions in this case having been disposed of, it remains but to consider whether the

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property, for which the executor insists he is not to account, was disposed of by the testator, as a gift *inter vivos*, or *mortis causa*. This property consisted of the furniture of his private apartments, his carriage and horses, his gold watch, and his wearing apparel. The testator was the proprietor of an establishment in Broadway, known as the City Assembly Rooms, in connection with which he had in the same building two rooms furnished for his private use. During his illness he was removed from these apartments to the residence of his son-in-law, the executor, where he died. On his removal, these apartments were locked up, and the key was in the possession of Taylor, the son-in-law. Taylor testifies that the deceased, during his life, gave the furniture in these rooms to his daughter, Mrs. Taylor; but his testimony on this point is loose, and, in my judgment, far from satisfactory. After stating that the testator gave his wearing apparel and his carriage and horses to his daughter, he says, "I don't know about the furniture, but I gave her the key of the room in which it was." But afterwards, in the course of his examination, he said that the testator gave her the furniture about six weeks before his death. He could not say whether it, or the horses and carriages, were given to her first, nor whether it was before or after the execution of the will, nor who was present except himself, the testator, and Mrs. Taylor, though it was his impression that there was somebody else in the room. He says that the testator said, as near as he, Taylor, could recollect, "My daughter, I give you the furniture in my room." That it was in the evening—that the testator was not in his bed, and that he did not say any thing, then, about his will. That afterwards he, Taylor, gave Mrs. Taylor the key of the rooms, and that two or three weeks before the testator's death, she ordered part of the furniture to be removed to her residence. That he did not know whether it was all removed at one time, or who did it, or whether it was stored.

Sneckner, the brother of the deceased, testified that he saw one load of the furniture "loading up," as he expressed it, on

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the day of the testator's death. Mr. Potter, the professional gentleman who drew the will, testified that he had a conversation with the deceased, some days after the execution of the will, in reference to the disposition of his property otherwise than by the will. That, as nearly as he could recollect, he called on Mr. Miller one evening, and that Miller stated to him that he omitted in his will to provide for a matter relating to a carriage and horses, and inquired whether it was necessary to have the will altered, or whether he could dispose of them by giving them away: that he stated that he had a pair of horses which, or one of which, had been very long in use by him, and to which his daughter was very much attached, and which he wanted her to have: that he, Potter, told him that it would not be necessary to alter his will; that he could dispose of it by gift: that he then sent for Mrs. Taylor, and that she came into the room, and that the substance of what had transpired was communicated to her. That he then expressed his desire that she should have whatever the conversation related to: that as nearly as the witness could recollect, the testator's language was, that she should have what he then gave her: that he could not recollect the language which the testator used when he addressed his daughter in regard to the horses and carriage, but that, according to his best recollection, the conversation embraced his pair of horses, his carriage, and the harness he had used. Nothing appears to have been said or to have occurred on the occasion respecting the disposition of the other property. Taylor was also present at this interview, and he testified that Miller gave the horse and carriage to his daughter at that time, and that she took possession of the carriage and horses several weeks before the testator died. It does not appear that there was any actual transfer or change of possession from the stable where they were left. Taylor merely says, "They were brought from the stable in Mercer-street to her house; I mean to say that they were subject to her orders; I know that the coachman took his orders from her:"—acts which show an acceptance of the gift by Mrs.

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Taylor, but which furnish no evidence of an actual delivery on the part of the testator.

All the testimony in respect to the wearing apparel is a mere general statement of Taylor that the testator's wearing apparel was given to his daughter, and that she took possession of it during his lifetime. How, where, or under what circumstances the gift was made and consummated by a transfer of the possession does not appear, nor any thing further upon the subject, except the statement of Taylor that there was a trunk at her residence containing the testator's apparel; and all that appears in respect to the gift of a watch is found in the testimony of Taylor, to the effect that he believed the testator gave it to his daughter to keep for his son, after the testator's death.

It is manifest from the nature of the property, consisting, as it did, of his wearing apparel, his gold watch, the furniture of the rooms which he occupied, and his carriage and horses, that what the testator intended was a gift *mortis causa*. It was his last illness; the disease of which he died is one that is generally found to be incurable; he had just made his will, and every thing tends to show that he was in present apprehension of the near approach of death. Under such circumstances, the presumption would be that what he intended was a gift of that nature, and not an unconditional disposition of the property.

To constitute a valid *donatio mortis causa*, there must, if the gift is by parol, be an actual delivery of the thing, so far as it is possible to make it. The mere fact that it has passed into the possession of the donee, even by the act of the testator himself, is not enough (*Hawkins v. Blewitt*, 2 *Esp.*, 663); but the circumstances must be such as are consistent with the presumption that he had parted with all dominion over it, subject only to its revocation upon the happening of any one of those events which make such a gift revocable, and distinguish it from a gift *inter vivos*. Whatever doubt may have existed in consequence of some ill-considered cases and loose dicta (*Spratley v. Wilson*, 1 *Holt's N. P.*, 10; *Wolley*

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v. *Borran*, *Clayton*, 135; *Hudson v. Hudson*, *Latch*, 214; *Brooks' Abm., Trespass*, 303), of the necessity of an actual delivery, they have been put an end to by numerous rulings since the decision of LORD HARDWICKE, in *Ward v. Turner* (2 *Ves., Sr.*, 431). "Tradition or delivery," said that eminent judge, "is necessary to make a *mortis causa*." "Both by the civil law, and the law of England," says BARON PARKE, "there must be, in this kind of donation, an act of delivery." (*Bunn v. Markham*, 7 *Taunt.*, 224.) It is now, said Chief-justice ABBOT, the well-established rule that a *donatio mortis causa* does not transfer the property without an actual delivery. (*Irons v. Smallpiece*, 2 *Barn. & Ald.*, 552.) And to the same effect are numerous American authorities. The testator may indicate his intention in the strongest way, as in *Bryson v. Browrig* (9 *Ves.*, 1); where, after having declared his intentions to put his daughter upon an equality with another daughter, he ordered his wife and executors to take two securities, a bond and a mortgage, out of a drawer where they lay with other securities: which she did, and by his directions placed them by themselves in another drawer, for and as the property of the daughter, and the testator pointing them out to the daughter, and referring to them several times afterwards as her property. In conformity with which directions his wife, after his death, as his executrix, paid over the amount of the securities to the daughter. In *Bunn v. Markham* (*supra*), where a testator even went further, by causing certain bonds, bank-notes, and guineas to be taken out of his iron chest, and sealed up in his presence, directing the amount of the contents to be written upon the package, with the words, "For Mrs. and Miss C.," and then further directed his brother to replace them in the chest, to lock and seal it up, and ordered it to be delivered to one of his executors; and yet in both of these cases, where the intention was certainly manifested as strongly as in the case now before me, it was held that the gift was not good, for the want of the essential requirement of an actual delivery and transfer of the property into the possession of the donee.

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The rigid adherence to this rule is, to prevent the abuse which would occur if a man's property could be disposed of, after his death, by the mere testimony of a witness as to his mental intention. In the Roman law, from which the validity of such gifts is derived, unusual solemnities were required as a security against fraud. It was requisite that both donor and donee should be present at the time of the gift; that it should be made in the presence of five witnesses; and that it should be limited in point of value. (*Dig. Lib.*, 39, tit. 6; *Cod. Lib.*, 8, tit. 37; *Strahan's Domat*, part ii., book iv., tit. 1, § 23.) The common law did not require all these formalities, but its policy has been uniformly against the encouragement of gifts of this nature. (*Harris v. Clark*, 3 *N. Y.* [3 *Comst.*], 93, 121; *Spratley v. Wilson*, *Holt's N. P.*, *Reporter's Notes*, 10.) LORD HARDWICKE even went so far as to express his regret that all gifts of the kind had not been prohibited by statute. (*Ward v. Turner*, 2 *Ves., Sr.*, 437.) They operate like legacies, taking effect only upon the testator's death; and as the law, to prevent perjuries and fraudulent attempts to secure a man's property after his death, has rigidly insisted upon certain formalities in the publication of last wills and testaments, and has prohibited the making of nuncupative wills, except by soldiers while engaged actively in military service, and by seamen while upon the sea, it is essential that something should be required in the case of gifts which are to have all the effect of a disposition of property by will, which will serve equally to prevent abuse; and hence the courts have settled down upon the rule, that there must be an actual delivery by the testator of the thing bestowed, and an acceptance and a reduction of it into his possession by the donee, to consummate the gift; and being once adopted as a rule upon broad grounds of public policy, it must be the test in every case, however strong may be the evidence otherwise to show an intention to make such a gift. As a further security, moreover, the law requires, to sustain a donation *mortis causa*, the most clear, circumstantial, and satisfactory proof to support such a disposition. Says LORD ST. LEONARDS,

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- in *Thompson v. Heffernan* (4 *Drury & Warr.*, 285), "I should require not a mere general statement of the fact of a gift having been made, but to be informed of the most minute particulars;—the amount, how it was given, when, where, in whose presence, and in what condition of mind and body the alleged donor was; in fact, all such particulars as might be expected in a fair transaction."

That the testator intended, in the present case, to bestow the carriage and horses upon his daughter, I do not entertain the slightest doubt; but there was wanting what the law requires, an actual delivery of them into her possession. Any act evincing an intent to deliver them, would be sufficient (*Goodrich v. Walker*, 1 *Johns. Cas.*, 253); but there is nothing shown by the evidence but the intention to give, which is not enough. What will constitute an actual delivery depends more or less upon the circumstances of each particular case. The delivery of the keys of the place where the thing intended to be given is kept, is a delivery of the possession, as it is the means whereby to come at the possession. (*Ward v. Turner*, 2 *Ves., Sr.*, 437.) In *Penfield v. Thayer, Public Administrator* (1 *E. D. Smith*, 305), a judgment in which I concurred, it was held that a gift by the intestate in these words, "My trunk, up-stairs, and what is in it, I give you; there is enough in it to take care of you for a spell,"—the trunk being in a room in the common occupation of donor and donee, in a boarding-house,—followed by the donor immediately quitting the house, without any intimation of an intention to return, though he did return afterwards, was a good delivery, though we were of opinion that the point was one of great embarrassment and doubt. In *Smith v. Smith* (1 *Strange*, 955), a *nisi prius* case, it was shown that the intestate lodged at the defendant's house; that he had furniture and plate there; that he had said whatever he had brought there he never intended to take away, but give directly to the defendant's wife; and that when he went out any time, it was his custom to leave the key of his rooms with the defendant; and this was thought to be such a mixed posses-

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sion as to dispense with any further act of delivery to consummate the gift. This case, however, has been frequently questioned. In *Royston v. Hankey* (3 *Moore & Scott*, 381), where the intestate had lived for five years in the house of his only child, under an agreement to pay her two shillings a week, and had, upon her premises, a cow, two calves, an ass, and some furniture, and had frequently told her that she was to have the animals and the furniture for what he owed her, repeating it a few days before his death, the court, though they thought the case was not free from doubt and difficulty, were of opinion that as the deceased had agreed that the property should be taken in satisfaction of his indebtedness, and as the property was all upon her premises when he declared that she should have it for what he owed, that was a sufficient delivery. In fact, nothing more could be done, as the property was all under her own roof, and no asportation or change could be necessary. But in *Huntington v. Gilmore* (14 *Barb.*, 243), where the testator, in his last sickness, and a few days before his death, conveyed a farm to his sister, on which she had resided for some time previous, and at the same time told her that there was personal property upon the farm, naming some of it, and that he would give it to her; it was held that there was no sufficient delivery of the property to support a gift; that the property was several miles off, and there was no act, nothing but words. When it is remembered that the sister and her husband were in actual occupation of the farm, that the property intended to be given was, in fact, in their possession, and that the testator had just executed a conveyance of the farm to his sister, this case is a very strong one, to show how strenuously the courts insist upon an actual delivery, and how unwilling they are to sustain gifts of this nature. The same reasons of public policy which led to the adoption of this rule, induced the enactment of the Statute of Frauds, and the course of modern decisions has been to construe the Statute of Frauds strictly—to give no effect to mere words depending upon the memory or truthfulness of witnesses, un-

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less they are accompanied by some act. It may be said that a man stretched upon a bed of sickness, and in present apprehension of the approach of death, can be expected to make such delivery only as is possible under the circumstances, and that the property he intends to give may be of such magnitude, or may be so situated, as to make an actual delivery of it impossible. If so, then it is not a proper subject for a gift *mortis causa*. The Roman law wisely restricted such gifts to an amount limited in value; and we conform to the spirit of that judicious rule by insisting, in every case, that all the requisites of an actual delivery shall be complied with. If a man will not or cannot put his intentions in writing, and he wishes to bestow what is not in his power actually to deliver, it is better that such gifts should fail, than that the door should be opened to the frauds, abuses, and perjuries that would follow if the law recognized that a dying man could bestow personal property, of any kind or value, merely by word of mouth.

In the present case, there was no impediment to an actual delivery on the part of the testator. If he had requested Mrs. Taylor to take the horses and carriage into her possession, and she had done so, or he had sent a message to the stable-keeper to deliver them to her, and they had been delivered accordingly, the gift, in my judgment, would have been consummated. But nothing of this kind has been shown. There were acts, on the part of Mrs. Taylor, amounting to an acceptance of the gift; but none, on the part of the testator, showing that he had delivered the property into her possession.

In respect to the furniture, there was a change of possession. But nothing to show that it was done with the knowledge or acquiescence of the testator. The fact that the furniture was in her possession before his death, is not of itself sufficient to warrant the presumption that there was an actual delivery. (*Kenny v. The Public Administrator*, 2 Bradf., 819.) It should appear that she took possession of it with the knowledge and assent of the donor; for without this,

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nothing is shown on his part but the intention to give, which is not enough. I am not satisfied, moreover, with the evidence produced to establish a gift of the furniture.

It rests upon the testimony of a single witness. That witness is the husband of the donee, and the executor who is required to account for it; and his testimony is too loose, vague, and general, to come up to the requisite of LORD ST. LEONARDS' rule. This applies equally to the gift of the wearing apparel. I should feel strongly disposed, if it were possible, to sustain the gift of the gold watch. That a dying father should desire especially to leave such a memento to an only son, and being absent, should give it to his daughter to be delivered to him, is most natural and probable; and that probability is heightened by the fact, that the watch was afterwards delivered by Mrs. Taylor to her brother. But the difficulty is, that there is no evidence whatever of the fact of the gift. Mr. Taylor does not swear to the knowledge of any declaration or act of the testator respecting it, but merely states his belief that it was so given, which is not enough to sustain a *donatio causa mortis*.

NEW YORK COUNTY—HON. CHARLES P. DALY, ACTING SURROGATE—
December, 1862.

SNECKNER v. TAYLOR:

*In the Matter of the final Accounting of the Executor of
GEORGE W. MILLER, deceased.*

On an accounting, one of the executors offered himself as a witness, to prove that certain property had never been in the actual possession of the executors, but had been given by the testator in his lifetime to his daughter (the wife of the witness), who was also a residuary legatee under the will. *Held*, that the testimony offered was not in violation of the common-law rule, that a husband cannot give testimony in favor of his wife, and must be admitted.

The question as to the validity of the alleged gifts *mortis causa* by the testator to Mrs. Taylor, the wife of the executor,

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Alexander Taylor, was disposed of by the surrogate. (See *Delmotte v. Taylor*, *Ante*, 417). On the final accounting, the executors omitted to charge themselves, in their account, with the sum of \$1,216, the appraised value of certain articles enumerated in the supplementary inventory as "furniture, &c., in possession of and claimed by the daughter of the testator, as having been given her by the testator during his lifetime."

William Sneckner and Mary J. Delmotte, legatees under the will, made such omission a ground of exception to the accounts, and alleged that the said articles "are in possession of the executors, or under their control, and that they are entitled to the same."

In support of this objection, the contestants called Wm. Sneckner, a party to this proceeding and one of the objectors, to show by him that some portion of the property in question was in the possession of the testator shortly before his death.

The surrogate held that Sneckner's testimony was sufficient, in the absence of rebuttal or explanation, to charge the executors with the property in question, as assets of the testator. Thereupon Alexander Taylor, one of the executors, offered himself as a witness to prove that said property was never in the actual possession of the executors, but was given by the testator, in his lifetime, to his daughter (the wife of said Taylor), who took immediate possession thereof.

Counsel for the objectors insisted that Taylor's testimony should be stricken out, on the ground that the witness was incompetent to testify for or against his wife, who, as a residuary legatee, was a party to the proceeding, and who claimed the property in question as a gift to her, *inter vivos*.

CHARLES F. SANFORD, *for the Executors*.

I. The common-law rule that husband and wife are incompetent witnesses for or against each other, where either is a party, or has an interest in the suit, has been held subject to exceptions. In collateral proceedings, not immedi-

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ately affecting their mutual interests, their evidence is receivable, notwithstanding it may subject the other to, or exonerate the other from, a legal demand. (*Greenl.*, 342, and cases cited.) The reason is, that the verdict cannot be used in a subsequent action.

II. In the present case, the husband is not disqualified under the common-law rule. (1.) Although nominally a party to the record, being summoned in the citation, the witness's wife is not a party to the issue, which is tried simply as between the objectors and the executors. (2.) The adjudication of the surrogate would not be conclusive upon her, in any action between herself and the executors, for the recovery of the property in question. (3 *Rev. Stat.*, 5 ed., 181, § 71.) (3.) Her interest in the result is contingent and uncertain, depending upon the fact of a residuum after payment of debts and legacies. (*Richardson v. Learned*, 10 *Pick.*, 261.)

III. The statute, which authorizes an executor (as such) to be examined on oath, "touching any property or effects of the deceased which have come to his hands, and the disposition thereof," is broad enough to remove the common-law disability, and to render the testimony admissible. He does not occupy the position of witness for or against his wife, or any one else. He is the subject of an inquisitorial examination, by virtue of his official capacity and the statute. The statute expressly authorizes his examination (either on his own behalf or otherwise) touching such property and its disposition.

A. R. DYETT, for Legatees and Objectors.

I. The wife will be directly affected by the decision of the surrogate on this question. We seek to increase the value of the assets by this property. The executor seeks to decrease it by the omission of it. (1.) The order on this accounting will be conclusive evidence as to both increase and decrease of the value of any assets. (3 *Rev. Stat.*, 5 ed., 181, § 71, subd. 4; *Stiles v. Burch*, 5 *Paige*, 521; *Glover v. Holley*, 2

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Bradf., 29; 5 *Sandf.*, 380.) (2.) By sections 78, 79, it is clear the statute intended to make the accounting final, and binding on all parties. If the property in dispute were in the hands of the executor, the surrogate could order its distribution. The fact that it is in the possession of Mrs. Taylor, does not alter the question of power in the surrogate to decide, so as to bind all parties. A decision adverse to the objectors on this proceeding, will protect the wife of the witness; the decision will enure to her benefit, for while under the will she gets three-fourths of the residue, she gets, in addition, the whole of this property now in dispute.

II. The statute (3 *Rev. Stat.*, 5 ed., 179, § 60) allows the examination of the executor only as to property admitted or conceded to be the testator's. It does not apply to the case of a contested claim of title between the estate and a third person. In cases like *Ogilvie v. Ogilvie* (1 *Bradf.*, 356), if he be examined concerning any property claimed to belong to the deceased, and apparently charged by his own testimony, there is an obvious justice in permitting him to discharge himself. But if the evidence be, *alivunde*, to charge him with property which he has not disposed of, and which has not come to his hands, and his excuse is that it is the property of another person, and has never come to his hands, he becomes a witness in chief, if he can in any case be examined, and such testimony does not come within the statutory examination; and if his wife be the claimant, he cannot be examined.

THE SURROGATE.—I shall allow the testimony of Mr. Taylor to be received in evidence.

SCOTT v. MONELL.

NEW YORK COUNTY—HON. CHARLES P. DALY, ACTING SURROGATE—
November, 1862.

SCOTT v. MONELL.

*In the Matter of the Accounting of the Executrix of ALEX-
ANDER L. M. SCOTT, deceased.*

A direction in a will that the executors invest a certain sum of money in the purchase of real estate, in their own names, in trust, and apply the income of it to the support and maintenance of the widow during her life, and to the support and education of two infant children, until they should become of age,—*Held*, void, as suspending the power of alienation for a longer period than that of two lives in being. A limitation upon minorities is a limitation upon lives.

Such a direction is not rendered valid by a subsequent provision of the will, that upon the death of the widow the sum so directed to be invested should become a part of the residuary estate.

It can make no difference whether or not any further limitation would be cut off by the widow's death during the minority of the children. The existence of a possibility that the trust might be carried over beyond two lives is sufficient to render it invalid.

An authority to executors to sell real estate in a certain contingency, and divide the proceeds among certain specified persons, does not vest the estate in the executors. It is simply a power, and the land passes at once to the devisees, subject only to the execution of the power.

The testator bequeathed personal property to his executors, to be held in trust until his infant son should become of age, but made no disposition of the income and profits that would arise from it before its distribution.

Held, that though the will did not in terms direct an accumulation, the direction led to that result, and the appointment of a time for the division was void.

The consent of infant heirs cannot be made the ground of any order which may prejudice their rights.

Thus, the written consent of the heirs (two of whom are infants), that an outstanding mortgage on a farm, devised by the testator to the widow, should be paid out of the personal estate, or that the widow should have the use of a certain sum of money during her pleasure, is invalid, and does not relieve the widow from her liability, as executrix, to account therefor.

The rent of a pew in church, rented by the widow for the use of herself and the children, after the testator's death, is not a charge upon the personal estate, and cannot be allowed to her on her accounting as executrix.

SCOTT v. MONELL.

The testator, Alexander L. M. Scott, departed this life on the 31st day of August, 1857, leaving a will bearing date the 8th day of January, 1857, and leaving him surviving, his widow, Margaret M. Scott, and his children, James O. Scott (afterwards declared to be a person of unsound mind, and represented in this proceeding by John J. Monell, his committee), John M. Scott, Fanny L. Scott, and Gilbert C. Scott—the two latter, minors.

By the second clause of his will, the testator gave his wife his dwelling-house, &c., situate at No. 582 Broome-street, in the city of New York. This devise was revoked by a codicil to the will, bearing date the 17th day of August, 1857, and in lieu thereof he gave her his farm, &c., situate in Orange county, New York.

By the third clause of the will, the testator gave to his executors and executrix fifty thousand dollars, to be invested for the support of his wife during life, and of his two children, Louisa and Gilbert, during their minority. (This amount was reduced by the codicil to forty thousand dollars.)

By the fourth clause, he directed that in case his wife should marry again, she should have the income of thirty thousand dollars, only during life, and that the income of the balance of the fund should be for the benefit of said minor children. This clause also provides that upon the death of his wife, the sum invested and set apart for her should become a part of his residuary estate.

By the sixth clause, he directed that on his son Gilbert becoming of age (or if he should die before that time, then in a reasonable time thereafter), his whole estate (except the fifty thousand dollars before invested and set apart), should be sold, unless the same could be divided to the satisfaction of all concerned.

By the seventh clause, he directed that the share of his estate given to Louisa should be invested, and the income thereof only should be paid to her during life.

By the remaining clauses of his will, the testator gave his

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executors and executrix power to sell his real and personal estate, and appointed his wife executrix, and his son James O. Scott, and his friend Matthias Clark, executors thereof.

The will was admitted to probate on the 8th day of October, 1857, and shortly thereafter letters testamentary were issued thereon to the persons named therein as executrix and executors.

Shortly after the death of the testator, his widow loaned the sum of forty thousand dollars, belonging to the estate, to one John W. Lewis, taking his bond and mortgage therefor in her own name. The interest received by her from Lewis, subsequently, she appropriated to her own use, and for the support of her two minor children.

She also invested the sum of seven thousand seven hundred and fifty dollars, of moneys belonging to the estate, in the purchase of a house and lot in Thirty-fourth-street, in the city of New York, the deed of which was taken in her own name.

She also paid the sum of nine hundred and eighty dollars as interest due upon a mortgage upon the farm in Orange county, which had been devised to her by the codicil in lieu of the Broome-street house.

On the 5th of October, 1859, the executrix, on behalf of herself and the executors named in the will, applied to the surrogate for a final settlement of her accounts as such, and afterwards filed her separate account.

In the accounts filed by her, Mrs. Scott credited herself with the sum of \$11,663.87, being the aggregate amount of interest received by her from John W. Lewis on the forty thousand dollars mortgage, and which she had expended for herself and her two minor children. This credit John J. Monell, as committee of James O. Scott, objected to, on the ground that the trust created by the third clause of the will (under which Mrs. Scott claimed the right to appropriate the money in the manner above stated), was void, as it suspended the absolute power of alienation for a longer period than that allowed by the statute. Other objections to the account

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were made, which appear in the opinion. On the part of the executrix, it was claimed that the payments with which she sought to credit herself, were all made by the advice and consent of all the children, and were formally ratified by them in writing.

LORD & BOLTON, for Monell, the Committee, &c.

I. The trust which the testator attempted to create by the second clause of the will is void, as it suspends the absolute power of alienation for a longer period than that allowed by law. (3 *Rev. Stat.*, 5 ed., 75, § 1.) (1.) Each minority counts a life; or, in other words, a limitation upon minorities is a limitation upon lives. (*Howley v. James*, 16 *Wend.*, 61; reversing 5 *Paige*, 318, 445; *Bowers v. Smith*, 10 *Id.*, 193.) (2.) If there is a possibility of the limitation extending over two lives in being at the death of the testator, it is void. (*Vail v. Vail*, 7 *Barb.*, 236; *Taylor v. Gould*, 10 *Id.*, 391, 398; 4 *Kent*, 283; 4 *Cruise*, 449.) (3.) There was such a possibility in this case.

II. The direction contained in the fourth clause, that upon the death of his wife the sum set apart for her should become a part of his residuary estate, does not relieve the trust from the imputation of illegal perpetuity. (1.) No such direction is contained in the second clause of the will, by which this trust was sought to be created, and it is quite clear that the provision quoted from the fourth clause was solely intended to meet a contingency which might arise in the event his wife should marry again. (2.) It is clear that the testator intended, by the second clause of the will, that his minor children should have the benefit of that fund during minority (or so much of it as might be necessary for their support). (3.) The fourth clause directs that the fund set apart for her (his wife's) benefit, should become a part of his residuary estate. There was no such fund set apart by the second clause, as that fund was for the joint benefit of herself and her minor children. (4.) This fund is specially excepted from the general division provided for by the sixth clause of the

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will, and which was to take place if Gilbert died during minority ; and this exception shows that the testator did not design that the trust should cease upon the death of either of the *cestuis que trust*.

III. The provision contained in the sixth clause, suspending the final distribution of the estate until the death of Gilbert, or his arrival at majority, was also void. (3 *Rev. Stat.*, 5 ed., 75, § 13.) (1.) A trust for the accumulation of rents and profits, for both adults and minors, is void as to the direction to accumulate. (*Hawley v. James*, 16 *Wend.*, 61; *Boynton v. Hoyt*, 1 *Den.*, 53.) Indeed, if there is a possibility that the accumulated fund may go to an adult, the direction to accumulate is void. (*Harris v. Clark*, 7 *N. Y.* [3 *Seld.*], 242.) (2.) An implied direction to accumulate is equally void with an express direction. (*Hawley v. James*, 5 *Paige*, 318, 481; *Vail v. Vail*, 4 *Id.*, 317.) (3.) The direction given by the sixth clause, necessarily leads to an accumulation ; and consequently the appointment of a further and distant time for the division of the personal estate, to which such an accumulation is a necessary incident, is void. (*Converse v. Kellogg*, 7 *Barb.*, 576, 597.)

IV. It does not follow, however, that the personal estate is to be distributed as in case of intestacy. The bequest to the residuary legatees is valid, and it is only the direction (express or implied) to accumulate which is void. The consequence is, that the residuary legatees are entitled to distribution immediately. (*Hons v. Van Schaick*, 20 *Wend.*, 564; 9 *Paige*, 521; *Jennings v. Jennings*, 5 *Sandf.*, 263; 3 *Seld.*, 547; 1 *Hill*, 492; 1 *Den.*, 646; *Williams v. Williams*, 8 *N. Y.* [4 *Seld.*], 525; overruling 15 *Barb.*, 139; *Kilpatrick v. Johnson*, 15 *N. Y.* [1 *Smith*], 322.

V. The item of \$980, being the interest on the mortgage upon the Orange county farm, with which Mrs. Scott has credited herself, must be disallowed. The farm having been devised to her with the incumbrance upon it, she took it subject thereto and charged therewith. There is no express direction in the will that the mortgage should be paid other-

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wise than out of the real estate. It was her duty to pay it off, or to pay the interest upon it if she suffered it to remain. (3 *Rev. Stat.*, 5 ed., 38, § 4; *Taylor v. Wendell*, 4 *Bradf.*, 324; *Horne v. Fisher*, 2 *Barb. Ch.*, 559; *Halsey v. Read*, 9 *Paige*, 446; *Howe v. Howe*, 10 *Id.*, 159; *Johnson v. Corbett*, 11 *Id.*, 265.)

VI. The executrix must be charged with interest on the sum belonging to the estate, which she appropriated to her own use on the purchase of the house 156 West 34th-street.

VII. The item for the rent of the pew occupied by the widow after the testator's death, was not a charge upon the personal estate.

C. MINOR and D. R. JAKES, for Executrix.

I. The gift of the residue is valid as a disposition of both real and personal estate, the suspension being for only the minority of one person; and neither a failure to dispose of the intermediate income, nor an illegal direction for its accumulation, whether express or implied, would render it void. (1.) There may be an implied as well as express direction for accumulation, but there must be something in the will to raise the implication; and the mere fact that a future interest is limited, and no disposition is made of the intermediate profits, will not authorize such implication. (3 *Rev. Stat.*, 5 ed., 13, § 40. (2.) The same rule is applied by the statute to personal property. (3 *Rev. Stat.*, 5 ed., 75, § 2; *Hastun v. Corse*, 2 *Barb. Ch.*, 506; *Williams v. Williams*, 8 *N. Y.*, 538; *Kilpatrick v. Johnson*, 15 *Id.*, 322; *Phelps v. Pond*, 23 *Id.*, 82; *Gilman v. Reddington*, 24 *Id.*, 19; *Hull v. Hull*, 24 *Id.*, 650.

II. It is error, therefore, to assume that the "interest and profits" will "accumulate meanwhile;" they go, as they accrue, by virtue of the statute, to the children. (1.) Going to the children by virtue of the statute, they are not subject to any of the restrictions or limitations of the will, and it is competent for the children to make such use of them as they see fit. (2.) As to the item objected to, it is immaterial

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whether the money was first received by the children and handed by them to their mother as a gift, or to be spent for their benefit; or whether they authorized her to apply it in the manner shown in the account.

III. There is no unlawful suspension of ownership in the direction, as to the fund of \$40,000; which is a disposition of personal property exclusively, and is governed by those rules only which apply to personal property. (*Stewart v. McMartin*, 5 Barb., 446; *Williams v. Conrad*, 30 Id., 529; *Jennings v. Jennings*, 5 Sandf., 177; *Powell on Devises*, by Jarm., 56; *Norris v. Beyea*, 13 N. Y., 273; *Sweet v. Chase*, 2 Comst., 73; *Hunter v. Hunter*, 17 Barb., 78.)

IV. If this provision is to be construed as continuing after the death of the widow, in case she dies before the infants are of age, it can only be reconciled with the subsequent positive direction—that it fall into the residue at her death, and be divided on Gilbert's majority—by considering the fund as then vested, but not in possession, and the gift as a pecuniary legacy, payable at a future time.

V. The investment having been made, and the interest applied as directed by the will, the amount of such interest credited in the account should be allowed. (*Bostwick v. Beizer*, 10 Abbotts' Pr., 197; *Collumb v. Reid*, 24 N. Y., 505.)

THE SUREGATE.—By his will, the testator, after certain specific devises and legacies, directed his executors, as soon after his decease as might be judicious, to sell stocks of any amount sufficient to realize the sum of fifty thousand dollars, which he afterwards, by a codicil, reduced to forty thousand dollars, and to invest this sum in mortgages upon real estate in their own names, in trust, to apply the income of it to the support and maintenance of his widow during her natural life, and to the maintenance and education of his two children, Louisa and Gilbert, until they became of age. He further declared, that if his widow should marry, that then she should have the income of thirty thousand dollars of the

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amount so invested for her support and maintenance during her life; and that the income of the residue should, in that event, be devoted to the support and education of the two children, Louisa and Gilbert, until they should arrive at the age of twenty-one years, when it should become part of his residuary estate, to be divided and disposed of in the manner afterwards directed; and at the death of his wife, that the sum so invested and set apart for her to receive the income thereof, should become part of his residuary estate, and be divided among his heirs then surviving, as provided in respect to the residue of his estate, and that it should be so divided at the time afterwards named by him. Then, by a subsequent clause, he directed that upon his son Gilbert arriving at the age of twenty-one years—or, if he should die before that period, then in a reasonable time afterwards—that his executors should sell the whole of his real and personal estate (except the forty thousand dollars before invested and set apart), unless the same could be divided and partitioned off to the satisfaction of all concerned; and that the proceeds should be divided among his children, if living, or their survivors, if any should have died, share and share alike;—the share which any child would have been entitled to if living, to be divided among the heirs of such child, if he or she should have any, share and share alike. And to effectuate and carry out the above provision, he clothed his executors with full power to sell and dispose of all his real and personal estate at the time appointed, and to give all necessary deeds and instruments for conveying the property so sold, and carrying out the sale thereof.

The trust estate in the forty thousand dollars is void, as it suspends the power of alienation for a longer period than that of two lives in being at the time of the testator's death. (3 *Rev. Stat.*, 5 ed., 75, § 1.)

A limitation upon minorities is a limitation upon lives. (*Hawley v. James*, 16 *Wend.*, 61.)

There was here three lives in being at the time of the testator's death—his widow, and his two infant children, Louisa

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and Gilbert; and if there is a possibility of the limitation extending over the lives of any two of them, it is void. (*Harvey v. James*, 16 *Wend.*, 61; *Vail v. Vail*, 7 *Barb.*, 236; *Taylor v. Gould*, 10 *Id.*, 391; 4 *Cruise*, 449; 4 *Kent*, 283.)

That possibility exists. If Louisa and Gilbert should die during their minority, the trust would continue until the death of the widow; and the absolute ownership of the property would, in that event, be suspended for a longer period than that of two lives in being at the time of the death of the testator; or, if one of the children named and the widow should die during the minority of the remaining child, the effect would be the same.

As either of these two events is possible, and may happen, the limitation is void.

It is suggested that there is not an absolute limitation during the minority of these two children, as, upon the death of the widow, the sum "invested and set apart, for her to receive the income thereof," is to become part of the testator's residuary estate, and that, consequently, if the widow should die during the minority of either Louisa or Gilbert, the trust would cease, and the limitation be put an end to.

This point has been simply taken without argument, and without the submission of authorities, and in the very short time that remains within which I am to administer the duties of this office, now limited to two days, it is not in my power, in the necessary attention which I must give to many other matters, to do more than to pass upon it as my present judgment dictates.

I do not think that the terms of the will would justify the construction that the trust was to cease if the widow died during the minority of these children.

It is expressly declared that the income of this fund is to be applied to their maintenance and support until they become twenty-one years of age, and this explicit provision would not, in my judgment, be affected either by the death of the widow before that period, or by the death of Gilbert during his minority.

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This fund is specially excepted from the general division which is to take place, should Gilbert die during minority; and should that event take place during the minority of Louisa, the trust would, I think, continue for her maintenance and education until she reached the age of twenty-one. The direction that "the sum set apart, for the widow to receive the income thereof," should, upon her death, become part of the residuary estate, and be distributed at the time when the general division of the estate was to be made, is, as I read the will, a direction given in view of the possible contingency of the marriage of the widow, and had reference only to the sum to be set apart for her upon the happening of such an event. It follows immediately after the clause which declares that in the event of her marriage she shall have the income of thirty thousand dollars only, during her life; and the language would denote that he refers to that sum, as he speaks of it as "the sum invested and set apart, for her to receive the income thereof:"—unless in such a contingency as her marriage, no sum can, in strictness, be said to be specially set apart for her, for the forty thousand dollars was to be invested for the joint benefit of herself and the two children during their minority. It is not declared what proportion of the income of it she is to have, or what proportion was to be applied to the maintenance and education of the children during their minority. That would seem to have been left to the discretion of the executors. In the event of her marriage, however, a specific sum is set apart for her, the income of which she is to receive during life; and another specific sum, the residue of the fund, is set apart for the maintenance and education of the children. I think, therefore, that the contingency which the testator contemplated, and for which he meant to make provision, was the possibility of the marriage of his widow, and of her death before the happening of the event upon which the general division of his estate was to take place, and that he meant only to refer to the sum which would, should she marry, be set apart for her. In creating this trust he certainly in-

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tended that the income of the forty thousand dollars should be a provision for the support of his widow during life, and for the education and maintenance of the two children during minority; and though, if the widow should die before they reached the age of twenty-one, the whole income would be more than sufficient for the maintenance and education of these children, still it does not follow from that, that the trust would cease. The executors could act on their own discretion, or take the direction of the court as to how much should be applied for that purpose, and the residue would accumulate. (*Gott v. Cook*, 7 *Paige*, 521; *Lang v. Ropke*, 5 *Sandf.*, 363.)

In *Clive v. Walker* (1 *Bro. C. C.*, 146), where the testator gave one of his sons maintenance out of a trust created upon his real estate, and also gave him maintenance out of a trust created upon his personal estate, the court held that he was entitled to two allowances for maintenance, and referred it to the master to ascertain what allowance was necessary for his support, and directed that the rest should accumulate for his benefit.

But I regard the question, whether the trust would or would not terminate by the death of the widow before the children attained their majority, as wholly immaterial upon the question of its validity. The test, in my judgment, is not whether any further limitation would be cut off by her death before that period, but whether there is a possibility that the trust might, by circumstances that may happen, be carried over beyond the period of two lives in being at the time of the death of the testator. I have pointed out that that is possible, and that, in my opinion, is sufficient to show that it is void.

The authority given to the executors to sell the real and personal property except the trust fund, did not, as respects the real property, vest in them any estate. It was simply a power, and the land passed at once to the devisees, subject only to the execution of the power if the whole estate could not be divided and partitioned off to the satisfaction of all

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concerned (3 *Rev. Stat.*, 5 ed., 20, 21, §§ 75, 77; *Germond v. Jones*, 2 *Hill*, 573; *Hall v. McLaughlin*, 2 *Bradf.*, 107), at the time appointed for the general division of it. The income and profits that might arise from it before it could be so divided or sold belonged to the heirs, and would not necessarily accumulate; but it is otherwise as respects the personal property. The title to that was vested in the executors, and as the testator had made no disposition of the income and profits that would arise from it before distribution could be made, the necessary effect would be that there would, in the mean while, be an accumulation of the income and profits, and not for any of the purposes allowed by statute. (3 *Rev. Stat.*, 5 ed., 75, § 13; 4.) Though the will does not in terms direct the accumulation, the direction given leads to that result, and consequently the appointment of a further and distant time for the division of the personal estate, to which such accumulation was a necessary incident, was void. (*Converse v. Kellogg*, 7 *Barb.*, 597; *Hawley v. James*, 5 *Paige*, 318; *Vail v. Vail*, 4 *Id.*, 417.)

There are certain items in the executrix's account which I cannot pass. All the heirs agreed, in writing, that the mortgage of five thousand dollars on the farm in Orange county, devised by the testator to his wife, should be paid out of and be a charge upon the personal estate, the same as debts of the testator not secured by mortgage upon real estate; that it should be paid out of the assets without any charge or claim upon the widow, and accordingly the executrix has paid off the interest upon the incumbrance.

Some of the heirs, however, who signed this instrument, are infants, upon whom it is not binding. When they become of age they may, and probably will, ratify the act; but so far as the right to pay this mortgage depends upon this agreement, I cannot allow such payment as a charge against the personal estate. The land is the proper fund for the discharge of the mortgage. She took the land charged with the incumbrance. It was her duty to pay it off, or to pay the interest upon it, if she allowed the mortgage to remain, no

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express direction being contained in the will that the mortgage was to be paid, otherwise than out of the real estate. (3 *Rev. Stat.*, 5 ed., 38, § 4; *Ram. on Assets*, ch. 29, § 1, and the cases there cited; 2 *Wms. on Ex.*, 144; *Taylor v. Wendell*, 4 *Bradf.*, 324; *Home v. Fisher*, 2 *Barb. Ch.*, 559.)

The bond for \$6,000, paid by the executrix to the corporation of Trinity Church, is in a different position. It was a debt due by the testator, for the payment of which he gave his bond. It was a charge, therefore, upon the personal estate, and not upon the realty, and the executors were bound to pay it out of the assets in their hands. This item will, therefore, be allowed.

The executrix should be charged with interest on the moneys of the estate which were appropriated by her in the purchase of the house and lot 156 West 34th-street. Three instruments were signed by the heirs, dated on the first of May, 1859, reciting that in consideration of their natural love and affection for the executrix, their mother, and in the further nominal consideration of the sum of one dollar, they agree that she shall have, use, occupy, and enjoy, during her pleasure, the sums of \$3,750, \$5,000, and \$6,000, making in all the sum of \$14,750, that sum having been appropriated by the executrix for the purchase of the premises purchased by her, No. 159 West 34th-street; but to these agreements the same objection exists, that they are not binding upon the infants, and they must, therefore, be held to be of no validity.

The small item for the rent of a pew in the church in Broome-street, rented by the widow for the use of herself and the children, after the testator's death, is not a charge upon the personal estate, and cannot be allowed.

The item \$100, paid to Mr. Bradford, is proved to have been paid for legal services rendered in the collection of rent. The two payments, to Mr. Smith, of \$350, were stated by him, upon the hearing, to have been paid to him for legal services rendered to the estate,—Mr. Smith's examination,

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under oath, having been waived by the opposing counsel. I shall, therefore, allow all these items for legal services.

The two safes were shown to have been purchased for the use of the estate; and, also, that they were necessary for the safe keeping of the mercantile books and voluminous papers left by the testator.

This, I think, embraces all the items that have been objected to. A decree will be entered accordingly.

NEW YORK COUNTY—HON. CHARLES P. DALY, ACTING SURROGATE—
December, 1862.

BROOME v. VAN HOOK.

*In the Matter of the Accounting of the executor of JOHN L.
BROOME, deceased.*

An executor claimed credit on his accounting for moneys advanced to a sister of the testator in his lifetime.

Held, that the court might presume, after a long lapse of time,—*e. g.*, twenty-six years,—a request by the testator, and hold the estate responsible. But inasmuch as the executor had omitted to prove the claim within the statute period of limitation, the credit could not be allowed.

But moneys advanced to the sister as a legatee, after the death of the testator, though made out of the executor's private means, and not out of the estate, must be allowed as a charge against the estate.

The payment of taxes by the executor accruing on the real estate, subsequent to the testator's death,—being for the benefit of the heirs,—the court, after a long lapse of time, will presume a request, and allow as a charge against the estate.

After a lapse of upwards of twenty years, the court will presume that the executor, in paying a debt barred by the statute, had evidence of a new promise by the testator, and credit should be allowed accordingly for such payment.

So, the payment of a judgment obtained against the executor on a demand barred by the statute, on proof of a new promise made by him,—*Held*, a proper charge against the estate. Every presumption must be given in favor of the executor after a long lapse of time,—*e. g.*, twenty-one years,—that he had good and sufficient reasons for making the new promise.

Where there is a conflict of testimony as to certain payments alleged to have

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been made to the widow by the executor, and no vouchers are produced,
—*Held*, that such payments will not be allowed.

The executor is not chargeable with dividends due the estate, not actually received by him, he having allowed such dividends to be retained in satisfaction of a debt due from the testator, even where such satisfied debt was barred by the statute.

The facts fully appear in the opinion.

HENRY WHITTAKER, Jr., *for Petitioners*.

CUMMINS, ALEXANDER & GREEN, *for Executor*.

THE SURROGATE.—Van Hook is cited, by the parties entitled to distribution, to render an account of his proceedings as executor of John L. Broome, deceased. Twenty-six years have elapsed since letters testamentary were granted, during which he has rendered no account,—except a partial one, about fourteen years ago, on the requisition of a creditor, to the settlement of which the petitioners in this proceeding were not parties. Four classes of charges in the account rendered by the executor are objected to by the petitioners; and they further claim to surcharge the account with sundry credits omitted by the executor.

As to one of these classes, the executor testified that he made them in the lifetime of the testator, by direction of Mrs. Boggs, a sister of the testator, and on her account; that he had not been repaid by her, but that he had had funds of hers in his hands subsequently. In the absence of positive evidence of repayment by the person for whose account these payments were made, the court, after this long lapse of time, would presume a request by the testator, and a payment for his account, and would hold the estate responsible; but, inasmuch as the executor has omitted to prove these claims before the surrogate, within the usual period of limitation, I must hold, on the authority of *Treat v. Fortune* (2 *Bradf.*, 116), and *in re Rogers** (11 *L. O.*, 245), that they must be disallowed.

* S. C., *Ante*, 231.

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As to another of these classes, the executor testified that after the death of the testator, having no funds of the estate, he was requested by two other sisters of the testator to make these payments for account of Mrs. Boggs, and did so in the same manner as the last class referred to. The executor testified that "at the time he made these payments, he had no money of Mr. Broome's estate in his hands;" and that he made them "on advisement with Mrs. Livingston and Mrs. Noon, two of Mrs. Broome's sisters, who said there would be no difficulty," and who assured him "that Mrs. Boggs would reimburse him,"—Mrs. Boggs having previously directed him to pay Mr. Broome's debts. In the absence of evidence of repayment by Mrs. Boggs, the payments must be allowed against the estate.

One of the last class of items was a payment of taxes on the real estate of the testator, accruing subsequently to his death. The payment being for the benefit of the heirs, the court, after this long lapse of time, will presume a request. The payment is therefore allowed.

One of the same class was a payment of a debt barred by the Statute of Limitations before the death of the testator. After this long lapse of time, the court will presume that the executor had evidence of a new promise, and that the payment was properly made.

Another class were two payments alleged to have been made to the widow, for which no voucher was produced. The widow positively swore that she never received them. The executor swore that he paid them to her, but failed to account for the absence of a voucher, further than by saying he never expected to be called on to account. On such a conflict of testimony, in the absence of vouchers, the payments must be disallowed.

Another class were payments made on a judgment obtained, in 1841, against the executor under the following circumstances: The executor pleaded the Statute of Limitations, and then abandoned the defence of the action and suffered an inquest, and the plaintiff had judgment on proof of a new

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promise by the executor, eleven years after the accruing of the debt, and five years after the death of the testator. Every presumption must be given in favor of the executor, after this long lapse of time; and the court will presume that the executor had good and sufficient reasons for making the new promise. I allow the item in question.

The estate was entitled to a yearly sum or dividend from John W. Livingston, executor, and the executor omitted to give credit for four years' dividends, from 1844 to 1847. In order to account for the absence of such credit, he testified that Mr. Livingston rendered him an account in 1847, in which he charged a debt due to him from the testator, but barred by the Statute of Limitations; that the executor allowed the same, but took no voucher for it. The executor ought not to be charged with the dividends in question, inasmuch as he did not actually receive them.

NEW YORK COUNTY—HON. CHARLES P. DALY, ACTING SURROGATE—
October, 1862.

In re SHERIDAN.

*In the Matter of Proving the Last Will and Testament of
PATRICK SHERIDAN, deceased.*

The will, which contained no attestation clause, nor any declaration that it was decedent's will and testament, was read over in the presence and hearing of the decedent and of the witnesses, and was spoken of as the decedent's "last will and testament" by a person present superintending its execution, who also requested the witnesses "to sign." But decedent did not declare the paper his will, nor request the witnesses to sign.

Held, that there was no publication.

A paper purporting to be the last will and testament of Patrick Sheridan, bearing date May 20, 1862, was propounded for probate.

Richard Joyce, one of the attesting witnesses, testified that he was present when the decedent signed the paper pro-

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pounded; that Father Hewitt, a Catholic priest, who was present, called the witnesses from an adjoining room to witness the will; that Father Hewitt read the will to the decedent in the presence and hearing of the witnesses, and that the decedent signed the instrument in the presence of the witnesses. The witnesses testified, that Father Hewitt spoke of the instrument as "the last will and testament" of decedent, and requested the witnesses "to sign." The decedent did not, in words, declare it to be his will and testament, nor did he request the witnesses to sign.

The other witness, Eagan, testified that after the will was read to the decedent, he said "it was all right, and he was glad it was over." He further corroborated the testimony of the other witness.

There was no attestation clause in the will, nor any declaration in the instrument that it was testator's last will and testament.

THE SURROGATE.—The will must be rejected, on the ground that there was no publication of the paper as decedent's last will and testament.

NEW YORK COUNTY—HON. CHARLES P. DALY, ACTING SURROGATE—
August, 1862.

BURTIS v. BRUSH.

In the Matter of the Guardianship of SYLVANUS A. BURTIS.

A guardian foreclosed a mortgage, which he held in trust for his wards, in obedience to an order of the surrogate; which also directed that out of the proceeds of the sale or foreclosure, he should pay over the sum due to one of the wards, who had come of age. At the sale under the foreclosure, the guardian, to prevent a sacrifice of the property, bought it in as guardian.

Held, that he must account to such ward for the amount of his bid.

A citation was issued requiring Walter F. Brush, executor of Maria A. Brush, and guardian of Sylvanus A. Burtis and his two sisters, to render an account. Brush made a return,

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showing his accounts, and stating that he had commenced proceedings to foreclose a mortgage for part of funds belonging to the three minors, of each of whom he was the guardian, the funds having been invested by him as guardian of all the minors.

A decree was entered by Mr. Surrogate West, in December, 1861, determining the amount due to Sylvanus A. Burtis, who had become of age; and the guardian was directed to proceed with the collection of the mortgage which was then due, and out of the moneys arising therefrom to pay the amount ascertained to be due Sylvanus A. Burtis.

Subsequently, on the petition of Burtis, showing that the guardian had purchased the mortgaged premises at a sale under foreclosure, an order was made requiring the guardian to appear and show cause why he should not pay the amount due to the petitioner.

The guardian, by his return, alleged that he had, in order to save the mortgaged premises from being sacrificed, purchased the same in his own name, as guardian of the three minors, and that he then held them as such guardian.

S. F. COWDREY, *for the Guardian.*

THE SURREGATE.—The minor, Sylvanus A. Burtis, having arrived at age, the guardian had no authority to purchase the mortgaged premises in behalf of his ward. He must, therefore, account to him for the amount realized under the sale of foreclosure.

NEW YORK COUNTY—HON. CHARLES P. DALY, ACTING SURREGATE—
December, 1862.

WORRALL v. DRIGGS.

*In the Matter of the Accounting of the Executor of PHEBE
DRIGGS, deceased.*

A receiver of the "debts, property, equitable interests," &c., of the executor appointed in proceedings supplementary to an execution, has not such

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an interest in the estate of the deceased as entitles him to an accounting by the judgment-debtor, as executor.

The interest of the executor in the assets of the estate is not vested until an accounting is had, so as to be subject to the lien of an execution.

One Penchard recovered a judgment against Chester Driggs, and on the return on the execution unsatisfied, and an examination of the judgment-debtor in supplementary proceedings, Lawrence Worrall was appointed the receiver of "all the debts, property, equitable interests, and things in action" of the judgment-debtor.

The receiver applied to the surrogate to compel said Driggs, the judgment-debtor, to render an account of his proceedings as the executor of the last will and testament of Phebe Driggs, alleging that the executor had never accounted to the surrogate, though over two years had elapsed since the issuing of letters. The receiver sought by this proceeding to ascertain the amount of the executor's commissions already earned, and to appropriate any surplus thereof, after satisfying all prior equities of the estate against the executor.

It was contended, on behalf of the executor, that the receiver had not such an interest in the estate as entitled him to an accounting.

HORATIO F. AVERILL, *for the Receiver.*

I. Even a contingent interest in the estate is sufficient to entitle the party having such interest to an order that the executor or administrator render an account. (1 *Barb. Ch.*, 489.) The receiver, who makes the application, is vested "with the debts, property, equitable interests, and things in action" of the judgment-debtor, without a special assignment. (*People v. Hulbut*, 1 *Code R.*, N. S., 75; *Porter v. Williams*, *Id.*, 144; 5 *How. Pr.*, 441; 12 *Id.*, 107; 25 *Barb.*, 662; 5 *Seld.*, 142.)

II. The interest of the executor (to whose rights the receiver here is subrogated) in the assets of the estate is vested, and can be ascertained to a certainty by an accounting. (1.) It is like the claim of a judgment-debtor to a division of the

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partnership profits, which claim is a "chose in action," and a lien attaches by supplementary proceedings. (25 Barb., 662; 2 Kent's Com., 437; 4 Den., 80; Chitty's Eq. Dig., in verba; 1 Parsons' Cont., 192.) (2.) No hardship will be done to the legatees; the equitable rights of all will be preserved as between the executors and legatees; but if there be a surplus of commissions after satisfying all prior equities of the estate against the executor, the creditor of the executor here should be entitled to the aid of equity to reach the surplus and appropriate it. It would be so in the case of a creditor of a separate partner. (*Eager v. Price*, 2 Paige, 333.)

JOHN SESSIONS, for the Executor.

THE SURROGATE.—I must decide that the receiver has not such an interest in the estate as will entitle him to an accounting by the executor.

The commissions due the executor from the estate not having been ascertained, on a proper accounting, it cannot be said that there is any thing due him from the estate.

OSWEGO COUNTY—HON. AMOS G. HULL, SURROGATE—March, 1868.

SWEET v. SWEET.

In the Matter of the Probate of the last Will and Testament of CHARLES S. SWEET, deceased.

The complete destruction or cancellation of a will, is not necessary to constitute its revocation. A destruction of it, as complete as was in the testator's power in his infirm health, is sufficient; the testator being of a sound mind, and the act being *animo revocandi*.

The testator tore his will into several fragments, which were carefully collected by his wife, and sewed together in such a manner that the instrument was perfectly legible when propounded for probate. The testator was of sound mind, though in infirm health, at the time of the tearing, and expressed satisfaction at its destruction.

Held, that there was a valid revocation of the will.

The widow of the deceased, an executrix named in the paper offered for probate, filed her petition, asking to have

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such paper admitted to probate as the last will and testament of the deceased.

On the 27th of January, 1863, the parties appeared and proceeded to a hearing. The facts fully appear in the opinion.

THE SURROGATE.—From the testimony, it appears that in 1861, deceased made a will devising his homestead to his wife; and after making liberal *bequests* to her, according to his means, and ample provision for his children, he gave certain small specific legacies to his mother, and his brothers and sisters.

In the fall of 1862, he was taken ill with pulmonary disease, and after being sick a few weeks, on the 3d of Nov., 1862, while confined to his bed, made a codicil revoking all the provisions of his will, and giving all his property, real and personal, to his wife. It appeared that there were several grave irregularities relating to the execution and publication of the codicil, to which it will not be necessary to refer, for the reason that another point in the case was raised of more vital consequence to the validity of the instrument than the irregularities relating to its execution.

From that part of the testimony concerning which there was a conflict or dispute, it appeared that about one week after the codicil was executed, and while the deceased was confined to his bed, he requested his wife to hand him the will. She at first declined. He told her that he wanted to see the man who drew it, and his brother, the executor. She finally handed him the paper. He took it in his hand, and holding it up before him, tore it into some ten or twelve fragments, and left the pieces on the bed. He then attempted to get up, but was prevented by the petitioner. He became excited and somewhat exhausted by the effort.

She gathered up the pieces and put them in a desk, without the knowledge of the deceased, and locked the desk, where the paper remained in the same condition until after the deceased was buried.

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The will and codicil and certificates of the witnesses were written upon one sheet of paper. When presented for probate, the several pieces had been sewed together by thread, in such an ingenious manner that the paper was perfectly legible.

It appears in evidence that the deceased did not know that the fragments of the paper were preserved; that afterwards, he frequently spoke of having torn up and destroyed his will, and expressed a desire to recover his breath, that he might be able to make another will.

In one conversation, while talking about a will, the petitioner remarked, "You have no will;" and the deceased replied, "I should have had another drawn, if my friends had not advised me not to."

The only testimony tending to show unsoundness of mind at the time of the destruction or revocation of the will, was that of the witness, who testified that deceased appeared excited, and wanted to get up and put on his clothes, and made use of singular language to his daughter respecting the petitioner.

On the contrary, the attending physician testified that he saw nothing indicating insanity or unsoundness of mind in the deceased;—that in talking with him, soon after the will was torn to pieces, he appeared to be perfectly rational; said the reason that he had torn it up was, there were others that he wished to benefit besides Julia—the petitioner.

A number of other witnesses corroborated the physician. From all the testimony, it is evident that the deceased died with the belief that his will had been utterly destroyed, and that no part of it was in existence.

Was this a revocation of the will within the meaning of the Revised Statutes?

The statute prescribes that a will may be revoked—1st. By another will in writing; 2d. By some other writing of the testator, declaring such revocation or alteration, executed with the same formalities with which the will itself is required by law to be executed; 3d. By burning, tearing, can-

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celling, obliterating, or destroying the instrument, with the intent and for the purpose of revoking the same; 4th. By marriage, or changes in testator's condition in life. (2 *Rev. Stat.*, 64.) Under the third requisite of the statute, in order to make the revocation complete, the act must be done *animo revocandi*. The mere act of tearing or cancelling is not sufficient. (*Jackson v. Holloway*, 7 *Johns.*, 394; *Jackson v. Pattie*, 9 *Id.*, 312; *Smith v. Hart*, 4 *Barb.*, 28; *Nelson v. McGiffert*, 3 *Barb. Ch.*, 158; *Perrott v. Perrott*, 14 *East*, 423; *Willard on Ex.*, 123.)

In this case, the tearing and obliteration and destruction of the instrument was as complete as the deceased had the power of making it, in his then state of health. He saw it lying about him in scattered fragments, evidently to him appearing so badly torn as to be incapable of restoration. His language before tearing the paper, and his subsequent conversation, clearly indicate his purpose at the time to be, to make a complete revocation of the instrument.

The restoration of the instrument into a legible form was no act of the deceased. He saw it in pieces, scattered about the room. He expressed himself satisfied that it was no longer in existence, and died in the full conviction that he had left no will.

With this view of the evidence, I must refuse to admit the instrument to probate.

NEW YORK COUNTY—HON. GIDEON J. TUCKER, SURROGATE—February, 1863.

JULKE v. ADAM.

In the Matter of the Probate of the Will of JOHN ADAM.

Greater reliance is to be placed upon the testimony of an impartial and respectable lawyer, in regard to the due execution of a legal instrument, than upon that of a non-professional witness.

Evidence of habits of intemperance, and occasional fits of wildness, though

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indicating an impaired mind,—*Held*, not sufficient to establish a total and permanent want of testamentary capacity.

The testator was aged, and his mental capacity greatly impaired by habitual intemperance. In the presence of his wife, he directed that his will, drawn according to former instructions, should be changed; "that he wanted to satisfy his wife, and it must be drawn as she desired it." The wife then gave directions as to the particular disposition of property, especially that two-thirds, instead of one-half, should go to her. It appeared that the wife had for some time directed the intentions and controlled the acts of the testator.

Held, that probate must be denied.

Declarations of a wife tending to show an existing intent and disposition to unduly influence her husband in procuring the execution of his will,—

Held, admissible.

Delafield v. Parish, approved and followed.

The testator died in New York city, the 12th of June, 1862. His widow, Louisa Adam, propounded for probate, as the last will and testament of the decedent, a paper, bearing date June 24, 1859, and witnessed by John A. Stemmler and Lorenz Sebastian.

Its probate was contested on the grounds of informality in the execution; of mental incapacity of the testator; and of undue influence exercised by his wife, the proponent.

DAVID LEVY and HORATIO N. WALKER, *for Proponent*.

N. SIEGRIST, *for Contestants*.

THE SUREGATE.—The testimony of the witness, John A. Stemmler, sufficiently establishes the observance of the necessary legal formalities. The will was read to the testator, paragraph by paragraph, first in English, and then translated by Mr. Stemmler into German (the native tongue of both); was then signed, sealed, published and declared in presence of the witnesses; and they signed their names at his request, in his presence and in that of each other. The document was then inclosed in an envelope by Mr. Stemmler, and taken away from Mr. Stemmler's office (where the execution was) by the testator himself; he intimating that its tenor should not be made public. The witness Sebastian recollects some of these circumstances only, and is positive that others

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of them did not occur; but the highly respectable lawyer, who himself drew the will and superintended its execution, is positive as to all these facts, and his testimony is clear and certain, while that of Sebastain, in the points where it varies from Stemmler's, is contradictory and forgetful. Greater reliance is to be placed upon the testimony of impartial and respectable members of the legal profession with respect to the execution of a legal instrument, than upon that of non-professional witnesses, upon whose minds the absolute necessity of the formula of law is not distinctly impressed. (*Moore v. Moore*, 2 *Bradf.*, 266.)

I have therefore no doubt that the formal execution of this will was according to the laws of this State. My predecessor on this bench appears to have had that opinion, since, on the 3d of November last, and after the evidence of these two subscribing witnesses had alone been given, he denied a motion to reject it on the question of execution, and directed the examination to proceed as to capacity and influence.

These are questions of the utmost delicacy, and they are rendered still more difficult to decide, when accompanied, as in most cases, by a contradiction of testimony. This evidence has not been taken before me; it was closed before my entrance into office; and I have had no opportunity to see and hear the witnesses, and to observe the many circumstances which aid a judge before whom testimony is actually taken, to arrive at a conclusion on the facts of the case. I must consider the testimony as it stands written down, and decide upon it, or run the risk of doing even a greater injustice to the parties concerned by summoning them to commence their voluminous proofs anew.

Thus situated, I am of the opinion, after many careful and thorough reviews of the entire testimony, that the weight of evidence does not prove John Adam, in the month of June, 1859, to have been by himself absolutely incapable of doing a legal act. It is true that his habits of intemperance appear to have been fixed and fastened upon him: he was occasionally wild and violent from the effects of intoxicating drinks.

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But it does not seem that he would have been incapable of making a devise of his estate by will, if left to himself, and to the exercise of his own will and preferences. His mind was undoubtedly impaired and weakened, and capacity may have been occasionally temporarily suspended; but capacity was not lost.

The questions of the formal execution, and of the competency of the testator, if free to act for himself, being thus settled, it remains to be considered, whether, in his condition of mind, with his habits and course of life, and his surroundings and relations with others, there was such an influence exercised over him that the will in question became, not his own will, but that of another person. I have been compelled to resolve this question in the affirmative, and shall deny probate upon this ground.

The testator was at his death sixty-six years of age. He was a German by birth, and had begun life in this country as a shoemaker, but "worked very little;" his first wife "made salves and cured sores, and saved the money." Subsequently he opened a lager-beer saloon, in attending to which his wife and daughter (the contestants) labored industriously. It was from the time of his first wife's death that he appears to have begun to be steadily intemperate, though there is evidence of his dissolute conduct earlier. It was on February 25, 1858, that his first wife died, aged sixty-six years. She fell dead in the bar-room. His conduct on that occasion shows him to have been grossly intoxicated, or morally and intellectually perverted to a shocking degree. He exclaimed, "There lies the d—d w—e, and I've got to bury her now." There is nothing to show that this first Mrs. Adam was not, as her daughter describes her, "an honest, decent, hard-working woman." A few months afterwards, a man named Yunun calls upon one Louisa —, then living as a servant in an emigrant boarding-house, at Union Hill, New Jersey, and tells her, "if she wanted a better place, to go to Adam's." Louisa goes at once to Adam's; engages herself to him as a servant at monthly wages; and herself swears

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that when she was advised to go there by Yunun, he told her that if she went, Adam "would probably marry her." Adam made good this prediction by proposing marriage to Louisa, as she swears, the very first night she was in his house; she accepted, and in a fortnight after (in September, 1858) they were married by Rev. Dr. Wiecezork, a Protestant German Evangelical clergyman. The new wife, who was under thirty years of age, and the daughter of the decedent, Mrs. Julke (the contestant of this will), at once, and very naturally, came to disagree; threats of violence were made; and Mrs. Julke left the house.

The will was made after this, and after Mr. and Mrs. Adam had been married ten months. The circumstances appear to be these. Mr. Siegrist, who lived in Adam's house, had drawn a will for Adam. Adam and his wife brought this will to Mr. Stemmler, saying to him they were not satisfied with it. "There was a general conversation, in which Mrs. Adam took part. She said the will was not drawn as they wanted it drawn." "Both seemed to be satisfied" with a memorandum of their joint instructions, which Adam gave Stemmler. "He did not say any more than she. She took a great interest in the conversation." The will being drawn, Mrs. Adam came down to Stemmler for it, and took it away.

The next interview was near Stemmler's house, in Seventy-first street. Adam and his wife came down there in a vehicle: she alighted, and called Stemmler out, Adam being too weak to leave the carriage. They both said then that this will (drawn according to the former instructions) was not as they wished it; "that not sufficient property was given to her." Stemmler asked how it should be changed, and Adam replied that "he wanted the will drawn as she desired it." She talked loudly and excitedly, whenever Stemmler saw her. She said "they were not satisfied with the will, and he then said he wanted to please and satisfy her, and that the will must be altered." She said, "We didn't want it so; we want it so and so," stating the particulars in which it was to be altered. The change which they directed was,

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that two-thirds of his property, instead of one-half, should go to her, the witness thinks. The will propounded for probate gives her two-thirds.

The next interview was in Mr. Stemmler's office; the will was not yet ready, and they went away, being requested by Stemmler to bring down a witness at their next coming.

It was at the next visit that the will was executed. It was read over to Adam by Stemmler, in his own room; but in the outer office was Mrs. Adam. They came together and went away together. Stemmler says "Adam was more or less under the control of Mrs. Adam." "She had a great deal of power over him." "I am of the opinion that Mrs. Adam exerted an undue influence over the deceased."

Mr. Stemmler states the circumstances of the constant attendance of Mrs. Adam upon her husband, with some particularity. He, Stemmler, never saw Adam without the wife. He received no instructions concerning business from Adam, except when the wife was present, and taking part in giving them. The provisions of the will being discussed, Adam said "he wanted to satisfy her," and Mrs. Adam said she wanted it to be so and so. Upon all occasions she appears to have directed the intentions and controlled the acts of her aged and weak husband. At times she was violent and threatening. But this one prominent fact appears above all—that she never left him; and that the instructions given as to the will show it to be her will, and not his.

The direct influence and interference of Mrs. Adam thus appear at every stage of the preparation and execution of this document. It went into her possession, it seems, and she "kept it in the desk" till the death of her husband. She admits that "out of joke she had told Adam she had destroyed this will." Again, she says, "I told him that I intended to tear it up." "Adam did not ask me to destroy the will;" but it does not appear that he knew or cared whether it was in existence or not, during the two years of almost uninterrupted drunkenness which closed his life.

The testimony of Mr. Stemmler would have been quite

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sufficient on the question of influence, but we find it corroborated by that of other witnesses called in the case. I leave out what the widow and the daughter say; also what the clergyman thinks. The latter never but once came into the lager-beer saloon, and had no opportunity to judge. But Stadleberger heard her say "I'm boss," and swears she "represented herself as boss," or head of the house; he shows Mrs. Adam's direct interference in and control of Mr. Adam's other business affairs; that she swore her husband should not sign a lease to him, Stadleberger, and he was compelled to sue Adam in consequence for a specific performance to obtain his lease.

Goetzel shows that Mrs. Adam did almost all of Adam's every-day business, directed and managed it, while "he was generally lying on the bed." It was "she spoke to me about the business; he never made any remark, but shook his head." She said, "I am boss of this house, and I will show him so." Goetzel also swears that Adam, four or five weeks before his death, told him to hand some money he had to Mr. Siegrist, to "put in the bank, so that something be secured for my daughter." Goetzel was directed by Mrs. Adam to make out a mortgage in lending money to Schneider, and other legal papers, and did so.

This testimony, as to the language and declaration of the person against whom undue influence is charged, was taken subject to objection; but I admit it all, as it is clearly competent to show declarations of a person so situated, so far as they tend to prove an existing intent and disposition. (*Brush v. Holland*, 3 *Bradf.*, 240.)

Our books are full of instances where probate of wills has been denied from evidence of undue influence exercised by children, creditors, attorneys, or trustees, upon the weakened mind of a testator; but to the credit of society we may remark, that the instances where the improper influence of a wife over the disposing mind of her husband has been established, are few in number. Probably the recent and impor-

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tant case of Henry Parish's will,* finally decided in the Court of Appeals, is the most prominent of these.

In that case, the maxim *qui se scripsit heredem* was mainly relied on by the learned bench, in arriving at the conclusion that the papers propounded as codicils did not make part of the last will of the deceased; and the circumstances, though not perfectly similar, resemble each other so much in that case and this, that I feel bound to hold the widow, the principal devisee under this will, to an equally rigid rule. In this case, as in that, the changes in the will were for the benefit of the widow from whom the instructions emanated, were drawn up by her procurement, and must be regarded as done, not by the testator, but by her. (1 *Curt. Eccl. R.*, 637; *Crispell v. Dubois*, 4 *Barb.*, 693; *Parke v. Platt*, 2 *Phill.*, 323.)

In the case of *Tunison* (4 *Bradf.*, 138), the proofs showed that the widow of the deceased was present at the execution of the will; and while he was dictating its terms, she interrupted him frequently. In one case she exclaimed, "Give it to me, and I will give it to them." But the surrogate held that there was nothing fatal in mere disconnected suggestions of this kind, as it was impossible to say to what part of the will they applied. In the present case there can be no doubt on that point. The changes made in Adam's testamentary dispositions were all for the benefit of the widow. The testator and his wife visited Mr. Stemmler, his lawyer, in company, in order to change his former disposition of his property so as to add to the share she should take after his death. It does not appear here, as in the *Tunison* case, "that the wishes of the decedent were unrestrained in their full gratification by the acts or inducements of his wife." He appears to have had no will of his own, and his property must be disposed of by the provisions of the law.

* *DeLafield v. Parish*, *Ante*, 1.

CUNNINGHAM v. SOUZA.

NEW YORK COUNTY—HON. GIDEON J. TUCKER—SURROGATE, February, 1863.

CUNNINGHAM v. SOUZA.

In the Matter of the Petition to compel the Executrix of the Estate of WILLIAM H. MERCHANT, to give security or be superseded.

The proponent, who is also the executrix, and a legatee under an alleged will of the testator, of a later date than that already admitted to probate, has such an interest in the estate of the deceased, pending proceedings on the probate of the paper propounded by her, as entitles her to petition for an order compelling the executrix of the will already admitted, to give security or be superseded.

The "due administration of the estate," for which an executor gives security, consists in paying its obligations, and handing over the balance to the persons entitled.

The facts sufficiently appear in the opinion.

LEVI S. CHATFIELD, WILLIAM C. RUSSELL, and CHARLES E. BIRDSALL,
for the Petitioners.

PIERREPONT & STANLEY, *Opposed.*

THE SURROGATE.—A paper was propounded as the last will and testament of William H. Merchant, and as such admitted to probate in this office. By this will Charlotte Souza was named as executrix, and letters testamentary have been granted to her. Subsequently to the probate of the Souza will, Selina A. Cunningham filed her petition, together with her husband, propounding for probate a paper of later date, alleged to be the will of said Merchant, and to have been since discovered, and praying that it may be admitted to probate, and that the decree admitting the Souza will be cancelled and revoked. In this paper so propounded, Selina A. Cunningham is named as sole executrix. These proceedings are now pending, and undetermined before me; the counsel for the alleged Cunningham will having examined the two subscribing witnesses thereto, but not yet rested their case.

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Meanwhile the petitioner has filed her petition, in which she alleges that she is one of the legatees in what she claims to be the last will of Merchant, and is the executrix under the same, and that she is interested in his estate; she shows that Charlotte Souza has possession of the estate as executrix, by virtue of letters testamentary granted to her; she alleges that the circumstances of Miss Souza are precarious, and that there is danger that the assets of the estate may be lost or misapplied; and prays that Miss Souza be superseded as such executrix, or that she give security pending the proceedings relative to the probate of the alleged Cunningham will.

It is admitted by the parties that the petitioner, Mrs. Cunningham, is one of the next of kin of the deceased Merchant; and that she is not named in, and takes no interest whatever under the Souza will.

Upon this state of facts, counsel for Miss Souza moved to dismiss the petition, as having been made by a person not "interested in the estate of the deceased." (3 *Rev. Stat.*, 5 ed., 156, § 18.) It is claimed by them that I cannot look beyond the will already admitted to probate by a decree of this court, to ascertain who may be "interested in the estate." In other words, that none but those claiming under the will can object to the executrix who is named in the will.

But it is not competent, in my judgment, to set up the decree of probate of the Souza will, which is attacked, as a bar to the alleged interest of the petitioner. I entertain no doubt whatever of the power of the surrogate to revoke that decree, upon proof of the paper propounded by the petitioner. If the court possess the power to revoke its decree, it is self-evident that the decree itself cannot be set up as a bar to the exercise of an authority which presupposes the existence of some decree on which to act. (*Campbell v. Logan*, 2 *Bradf.*, 91.)

In this matter, the two parties are before me as litigants in respect to Merchant's whole estate; claiming under the two papers;—the one already admitted to probate recognized by this court as the will, and partially executed; and the

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other, of later date, propounded for probate. The question is, whether, pending such litigation, I am not compelled to assume that they are all "interested in the estate." What the interest of each may be, I cannot try now; it must be determined by the event of the litigation. Any apparent interest, positively sworn to as this is, has invariably been held sufficient to justify the demand for security in this court. (*Dayton on Surrogates*, 597.) And a higher court has held that a contingent remainder-man might petition. (*Emerson v. Bowers*, 14 N. Y., 449.) And the case of *Cotterel v. Broch* (1 Bradf., 148), is a strong one to show that any person who may become "interested in having the estate preserved in the hands of a responsible executor," thereby establishes a "sufficient interest to authorize the intervention of the court."

In the same case (p. 150), the learned surrogate remarks:

"In the ecclesiastical courts, on an application for an account, the validity of a demand will not be tried. Nor will the Statute of Limitations be allowed as a bar. As in cases of bail at common law, it is a wiser and more salutary rule to treat a demand, positively sworn to, and *prima facie* valid, as establishing interest."

But the counsel for Miss Souza raise the point that the security, if directed to be given by Miss Souza, must be given "for the due administration of the estate;" and that this due administration must consist in carrying out the provisions of the Souza will, already admitted to probate, and under which the petitioner has no interest. That is not exactly the case. The due administration of the estate, for which an executor gives security, consists in paying its obligations, and handing over the balance to the persons entitled—the persons to whom the law awards it. If the Souza will be maintained, the law will have made it the duty of the executrix to pay over the balance to herself as the residuary legatee. If the alleged Cunningham will, however, should be admitted to probate, it will be as much a part of Miss Souza's "due administration of the estate" to pay over the

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balance to the person who has been ascertained by the law to be the representative of the estate under that will, as it would be for her to pay it to an administrator with the will annexed, should she be superseded on this application.

The motion to dismiss the petition, for non-appearance of interest, is denied.

NEW YORK COUNTY—HON. GIDEON J. TUCKER, SURROGATE—March, 1863.

LIBBY v. CHRISTY.

*In the Matter of the Petition of the Collector of the Estate of
EDWIN P. CHRISTY, deceased.*

On a petition by a special collector appointed during a contest on the probate of a will, for an order directing the sale of certain personal property alleged to belong to the estate, it appeared that the property in question was in the actual possession of a person claiming to be the widow of the decedent, who also claimed title to it on the ground that she had loaned the decedent the money with which the property was purchased.

Held, 1. That the paper propounded as the decedent's will, could not be resorted to for evidence as to the title.

2. Without trying the absolute title of the property, the surrogate must determine the probable ownership.

3. Although the probable title was in the estate, yet the surrogate would not order a sale of property which was not actually in the hands of the representative of the estate; but would direct the collector to bring suit to test the title.

The facts fully appear in the opinion.

JOHN C. VAN LOON, *for Collector.*

A. W. BRADFORD and P. G. CLARK, *for Mrs. M. A. M. Christy.*

SAMUEL JONES and C. K. SMITH, *for Mrs. Harriet E. Christy and E. B. Christy.*

THE SURROGATE.—The collector of the estate, in his petition, sets forth that among the articles inventoried as assets

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of the estate, are the household furniture, pictures, paintings, &c., now in the house occupied by E. P. Christy at the time of his death, and appraised at \$2,662; that said house is occupied by a person named, in what purports to be the will of said Christy, as his wife; that more than forty days have elapsed since Christy's death; that, in the judgment of the collector, it is necessary, for the preservation and benefit of said estate, to sell said property, unless the same be amply secured to said collector; that he is, and has been, since his appointment as collector, obliged to keep a man hired to watch said property, at an expense of two or three dollars per day; that, in its present position, said property is not secure; that the collector has no safe place to keep the same, except at a great pecuniary expense to the estate; and he therefore prays that he be directed to sell said property.

These statements are met by an affidavit of Mary Ann Maples Christy, who alleges that she is the widow of the decedent; that she had no knowledge, nor was she aware that the appraisers and collector, or either of them, had any intention to inventory the furniture, pictures, paintings, &c., now in the house occupied by her, till the said appraisers and collector came to the house to take the same; that she was not privy in any manner to the making of said inventory; and that at said time she caused the said appraisers and collector to be informed that the said furniture, pictures, paintings, &c., belonged to and were owned by her; that at or about the time she and the said Edwin P. Christy, deceased, commenced housekeeping at No. 96 Grand-street, in said city, she loaned to said Edwin P. Christy the sum of about ten thousand five hundred dollars; that five thousand five hundred dollars thereof were the proceeds of the sale of real estate she owned in Philadelphia, and the balance was money she had on deposit in savings banks; that all of said furniture, &c., was purchased with her said money, and the same was insured in her name during the lifetime of said Edwin P. Christy, and with his knowledge and assent, and the same is now insured in her name. She further says, that

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she purchased a house with her own money, and in her own name, and that immediately after she took possession of said house, and had removed thereto the furniture, &c., contained in the house No. 96 Grand-street, and that she has ever since said time occupied said house so conveyed to her as aforesaid; that she is abundantly responsible, has no family, and the said furniture is but little used, and is not in any sense perishable, and will be better preserved by remaining where it is than by storing it; that said furniture, pictures, paintings, &c., would be sacrificed at less than their value, if sold at auction; and that the estate will be neither preserved nor benefited by said sale; that the said furniture, &c., are entirely secure, and she has no intention to remove them, but means to continue her residence in said house, and retain possession of said property there, until this case is terminated by a judicial decision, if not longer.

I may refer, in addition to these statements of the deponent, to that of her counsel in court, that she would consent neither to secure to the collector the value of this personal property, nor to yield up its actual possession, without the judgment of a court of record.

The paper propounded as the will of E. P. Christy is before me, and its admission to probate is contested in this court by Mrs. Harriet E. Christy, also claiming to be the widow of E. P. Christy, and by E. Byron Christy, claiming to be his son. In this alleged will, the property in question is mentioned; but as the will is not yet admitted to probate, I cannot look into that instrument for evidence upon which to act.

I cannot try the title to this property (*Will. on Ex.*, 221; *Dayton on Surr.*, 231); and yet I am unable intelligently to give directions to the collector, without incidentally looking into the question of probable ownership. Thus, if there appear to be "a clear outstanding title against the estate" (*Public Administrator v. Burdell, 4 Bradf.*, 252), I ought not to interfere on behalf of the estate. But "if there is a reasonable cause for doubt," as the learned surrogate re-

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marked in the estate of Harvey Burdell (*ut supra*), "the proper course is to permit the sale, and let the question be tested by the court having jurisdiction of the matter.

In this case, I feel compelled to say I do not perceive any "clear, outstanding title against the estate." Mrs. Mary Ann Maples Christy swears that she loaned the decedent the money with which the furniture was purchased; and she thus (even if her testimony were admissible under the Code, as to a transaction between herself and the decedent) establishes only, at most, a debt from the estate to her for the loan. It is true that she swears she informed the collector that the furniture was hers, but she does not swear that it *is* hers. The evidence she presents would not support her claim to the ownership of this furniture in a trial at law.

Nor does Mrs. Christy, in her affidavit or otherwise, claim title to this property by gift in the lifetime of the decedent. In this respect her claim is not as strong as that made by Mrs. Parish (*Delafield v. Parish*, 4 *Bradf.*, 24), where the surrogate gave leave to the collector to bring suit for the recovery of certain stocks and securities, standing in the widow's name, and claimed as her individual property. Mrs. Parish swore that these were gifts; Mrs. Christy does not allege any legal title whatever, but merely avers that she has possession and "means to retain it."

But the present case resembles that of the Parish estate, in this particular: that the property claimed by the widow, or the person assuming to be the widow, is in the actual custody and possession, not of the collector, but of herself. The collector in the Parish estate would not have been able to expose the articles to sale, without first trying title, had he been directed by the surrogate to sell them for the benefit of the estate. It is so in this instance: the counsel has announced that possession of the furniture, &c., will not be yielded up to the collector without a trial at law. It was otherwise in the Burdell case, where the collector appears to have had the property actually in his custody: the claimant was in prison, and no suit was necessary.

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I am not disposed to make an order for the sale of what is not actually in the hands of the representative of the estate, although the probable title is in the estate. Such an order would not add to the powers or the security of the collector. He would still have to await the decision of a court of jurisdiction competent to award the title.

The proper way, doubtless, is to direct the collector to bring suit to test the title. This he has already, by the statute, power to do, without any direction; but the latter will be an absolute evidence of his good faith, and his warrant for the proceeding.

Should the will go to probate, such a suit would abate; while if probate be denied, it would, if undetermined, pass over to the permanent administrator of the estate.

Should the estate succeed in it, I will then consider the propriety of the sale.

NEW YORK COUNTY—HON. GIDEON J. TUCKER, SURROGATE—May, 1868.

LAROCQUE v. CLARK.

In the Matter of the Petition for Payment of a Legacy, in the Estate of CHARLES SAXTON, deceased.

The testator directed a certain sum to be invested by his executors, the income thereof to be paid to his parents during life; and on the death of both, out of the sum so invested, to pay \$2,500 to the testator's brother. The brother died before either parent.

Held, 1. That the legacy to the brother, consisting of personal property, and being chargeable on the personal estate, vested from the testator's death; and, on the death of both parents, should be paid to the legatee's personal representative.

2. The gift was not payable on the happening of a contingent event. The mere postponement of the actual possession of a legacy affixes no condition to its actual vesting. (*Nodine v. Greenfield*, 7 Paige, 544—distinguished.)

Joseph Larocque, the administrator of the goods, &c., of Warren Saxton, deceased, presented a petition for an account—

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ing by George Clark and Orville Brooks, executors of the last will and testament of Charles Saxton, deceased. The executors rendered an account of their proceedings, when it appeared that the sum of ten thousand dollars was in their hands for distribution.

The testator, by his will, directed, among other things, "that \$10,000 of my estate be invested by my executors in some safe stock," &c., "and I hereby give the whole income and profits of said \$10,000 to my father, as long as he shall live, and then to my mother as long as she shall live;" and "after the death of both my father and mother, out of the \$10,000 invested for their benefit, I give and bequeath the sum of \$2,500 to my brother, Warren Saxton," &c. "And I request and direct my executors to apportion my property among those interested."

Warren Saxton died in the lifetime of his father and mother. Both the latter being dead also, the administrator of Warren petitioned the surrogate that the executors of Charles Saxton be directed to pay over to him the \$2,500.

JOHN SHEERWOOD, *for the Executor.*

I. The fund of \$10,000 was intended to be, until the decease of the parents, a perfect and indivisible fund, and the vesting does not take place until the time arrives when the division is to be made.

II. Where the whole gift is contained in a direction to the executors to pay or divide at a future time, or in a certain event, the vesting often does not take place till the time arrives or the event happens. (*Leake v. Robinson*, 2 *Meriv.*; 363, 387.)

III. The most that can be said of the interest of Warren Saxton is, that he was vested with the amount named, \$2,500, liable to be divested by his death in the lifetime of his father and mother.

IV. The fund in question goes to the residuary estate, and should be divided accordingly.

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JEREMIAH LAROCQUE and WILLIAM BLISS, for the Petitioner.

THE SURREGATE.—I. As to the first point raised by the executor, I believe it to be the general rule of law, that a legacy, payable in the future, and consisting of personal property, or charged upon personal estate, vests from the death of the testator. The law was otherwise as to legacies charged upon the realty, and the chancellor showed the distinction between them, in his remarks in *Birdsall v. Hewlett* (1 *Paige*, 32). He said, "Legacies charged upon the real estate and payable at a future day, are not vested, and become lapsed, if the legatee dies before the time of payment arrives. This rule was at first adopted without any exceptions, and in direct opposition to that which existed in regard to legacies payable out of the personal estate." And WILLIAMS lays down the rule with precision (2 *Will. on Ex.*, 776), as follows: "Where a person bequeaths a sum of money, or other personal estate, to one for life, and after his decease to another, the interest of the second legatee is vested, and his personal representatives will be entitled to the property, though he die in the lifetime of the person to whom the property is bequeathed for life." (And see *Barker v. Woods*, 1 *Sandf. Ch.*, 131.)

II. Nor is this a case where "the whole gift is contained in a direction to executors to pay or divide on a certain event." Time, in this case, was annexed only to the gift, and not to the substance of the gift; and is not connected with any event to happen to the donee. (*Van Wyck v. Bloodgood*, 1 *Bradf.*, 154.) The mere postponement of the actual possession of the legacy affixed no condition to the immediate vesting of the interest.

III. As to the question whether the legacy once vested could be divested by the death of the legatee, I am referred by the executor's counsel to the dictum of Chancellor WALWORTH, in *Nodine v. Greenfield* (7 *Paige*, 544). But that was a real estate case—a devise of a remainder in fee to such children (nephews of testator) as should be living at the time of the decease of his widow, their aunt, and it was of course

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held that they took subject to be divested by their death during the aunt's life estate, and subject to open and let in children born during the life estate. The cases of *Baker v. Lorillard* (4 N. Y. [4 Comst.] 257), and *Wilson v. Wilson* (32 Barb., 328), are of the same nature.

IV. It is my judgment that the legacy to Warren, under the will, vested from the death of the testator, and that it now belongs to his representatives. A decree will be entered as prayed for.

NEW YORK COUNTY—HON. GIDEON J. TUCKER, SURROGATE—June, 1862.

ELMER v. KECHELE.

*In the Matter of the Administration on the Estate of MAD-
ALENA KECHELE, deceased.*

An applicant for letters of administration will not be precluded from receiving them by reason of his intemperance, unless it be of such a gross character as would warrant overseers of the poor in designating him an habitual drunkard, under the Revised Statutes, or a jury in adjudging him so to be.

The intestate died January, 1, 1863, and her husband applied for letters of administration upon her estate. Jacob Elmer, an alleged creditor of the intestate, opposed the granting of letters, on the ground that the petitioner was intemperate in his habits, which incapacitated him from administering upon the estate.

PHILIP F. SMITH, *for Petitioner.*

JOHN C. LAUG, *for Creditors opposing.*

THE SURROGATE.—The question in this case is, whether the husband of the deceased is incompetent, by reason of drunkenness, to administer on her estate. Several witnesses swear that they have seen Kechele intoxicated from time to time.

But they do not show, in my judgment, habitual, con-

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tinued, inveterate, and irremediable habits of drunkenness, incapacitating him for the transaction of business. Only such habits can be held to have been intended by the statute as a disqualification of any person for the trust of administration on the ground of drunkenness, as would warrant overseers of the poor in designating such person as an habitual drunkard, under the Revised Statutes, or a jury in adjudging him so to be. The law expressly confides the privilege of administering upon a deceased wife's effects to her surviving husband, on condition of his giving adequate security, and this privilege is not to be forfeited without clear evidence of his incapacity.

Kechele must be granted letters of administration, on filing his bond in double the value of the personal estate, with two sufficient sureties, justifying to the satisfaction of the surrogate.

NEW YORK COUNTY—HON. GIDEON J. TUCKER, SURROGATE—October, 1863.

NORTON v. LAWRENCE.

In the Matter of the Probate of the Will of ABRAHAM R. LAWRENCE, deceased.

On proceedings for probate of a will, a claim of interest positively sworn to will make the claimant a contestant before the court, and a party to the proceedings.

The appearance of an interested party in open court, on the return-day, though not served with citation, entitles him to be heard.

Objections to the probate of a will, on the ground of its want of due execution, being filed by certain infants claiming to be legitimate grandchildren of the deceased, it is not necessary to try the question of the interest of the objectors before proceeding to the question of the due execution.

The issue of interest and the issue of due execution do not constitute separate and distinct proceedings.

The testator, Abraham R. Lawrence, departed this life on the 3d day of August, 1863, and on the 13th of the same month the will was propounded by Andrew Lawrence.

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On the return-day of the citation, Chauncey L. Norton appeared and filed objections to the probate of the will, on the ground of undue execution; and alleging that the deceased had during his lifetime a wife; and that there was issue by said wife—to wit, one daughter, the wife of the contestant, now dead; by which marriage there were three children, now infants, and the grandchildren of the deceased.

The proponents sought to compel the contestants to prove their legitimacy, before admitting them to the status of contestants of the will.

JOHN C. VAN LOON, C. K. SMITH, SAMUEL JONES, and BENJAMIN J. BLANKMAN, *for Contestants.*

WILLIAM B. AYTHEN, *Special Guardian for Infants.*

JOHN S. LAWRENCE and GILBERT DEAN, *for Proponents.*

THE SURROGATE.—The petitioner in this matter prays for the admission of the will to probate and for the issuance of letters testamentary, and sets forth the names of a number of persons whom he alleges to be the only heirs at law and next of kin of the deceased, averring that the deceased was never married. As is the practice in this court, citation was accordingly issued to the persons so named; and on the return-day objections were filed on behalf of certain infants, claiming to be legitimate grandchildren of the deceased, who deny the legal execution of the paper propounded as a will, and claim to contest its probate.

The proponents now insist that the question of the interest of these infant objectors must be first tried and decided; and that in case of a decision favorable to the objectors, on that issue, they must then be brought before the court, like the other next of kin (by a further citation), before they can be considered as on the status of contestants. In other words, they contend that the issue of interest and the issue of due execution must constitute two separate and distinct proceedings.

The practice in this court has not been thus strict. On the

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proceedings for probate of a will, as in proceedings for an account, to compel the giving of security, &c., a claim of interest, positively sworn to, will make the claimant a contestant before this court, and a party to the proceedings; and his appearance in open court on the return-day waives the service of citation.

"When a person appears before the surrogate to oppose the probate of a will, he is bound, if the adverse party disputes his interest, to show his interest, as his right to contest the will." (*Dayton on Surrogates*, 159.) And it is further held, that "if issue be taken on the allegation of interest, the evidence in relation to that question, and that which relates to the proof of the will, should proceed *pari passu*." And the proceeding is a single one, and is so conducted here.

NEW YORK COUNTY—HON. GIDEON J. TUCKER, SURROGATE—August, 1863.

BEEBE v. HATCH.

In the Matter of the Estate of ROBERT HOGAN, deceased.

The surrogate has no power to direct and control the conduct of executors and administrators in other courts.

Thus, where the surrogate granted an order enjoining the executor from further action as executor, until the conclusion of a controversy then pending; and notwithstanding such order, the executor began an action in his own name, as executor, in the Supreme Court;—*Held*, not a contempt of court, for which the surrogate would direct an attachment to issue.

One Beebe, a creditor of the estate, obtained an order to show cause why the executor should not give security, or be superseded. On the petition, an order was granted by the surrogate, enjoining the executor from further acting in the premises as executor, until the matter in controversy was disposed of.

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After the service of this order, and while the injunction was in force, the executor commenced an action in the Supreme Court, as executor, against Beebe, the party who obtained the injunction before the surrogate.

Beebe, on being served with the summons and complaint by the executor, moved, before the surrogate, for an order to have the executor show cause why he should not be punished as for a contempt, in violating the injunction-order; contending that the injunction was absolute in its character, restraining the executor from acting in any manner in the business of the estate; and that the executor could commence an action in another court, only on an application to the surrogate to have the injunction modified or dissolved for the purpose.

The executor showed cause, and denied the violation of the order, contending that it was not a proper construction of the third subdivision of 2 Rev. Stat., § 1, subd. 3, to give to a surrogate the new and extraordinary powers to "direct and control" the conduct of executors and administrators in other courts; that it was a power which had never been exercised by the courts of probate in this State, or by the ecclesiastical courts of England, and cited *Matter of Parker* (1 Barb. Ch., 154); *Grant v. Quick* (5 Sandf., 612); *Bennett v. Leroy* (6 Duer, 685; 5 Abbotts' Pr., 55.)

STEPHEN P. RUSSEL, *for the Petitioner.*

ROSWELL D. HATCH, *for the Executor.*

THE SURROGATE denied the motion for an attachment, and entered an order discharging the order to show cause.

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NEW YORK COUNTY—HON. EDWARD C. WEST, SURROGATE—July, 1862.

DECKER v. MORTON.

In the Matter of the final Settlement of the Estate of GEORGE H. POWELL, deceased.

An assignment by a married woman of all her interest in the estate of a deceased person, in consideration of the assignee's forbearing to arrest the assignor's husband for an embezzlement of his funds, and a promise to continue him in his employment, and pay his salary to her,—*Held*, void for want of a legal consideration. The fact that part of the consideration was legal, will not sustain the agreement.

An agreement to forbear arresting a person, will be presumed to mean either a criminal or civil arrest.

Proof of an earlier ceremonial marriage rebuts a presumption of marriage founded on reputation, cohabitation, and social recognition.

An assignee of the distributive share of one of the next of kin, having neglected to bring an action on the assignment, and left the administrator to settle his accounts with the assignor, cannot afterwards ask the surrogate to try its validity on the accounting of the administrator. (*Supreme Ct.*; INGRAHAM, J.)

On the accounting of the administrator of George H. Powell, one Decker presented an assignment executed by Mrs. Amelia D. Morton, who was (except for the assignment) entitled to a distributive share of the estate, transferring to him all her interest in the estate; and he claimed that her share be paid to him.

For several years prior to the assignment, Mr. Morton had been employed by Decker to sell merchandise to purchasers, and collect the price. To secure the amount of \$1,394.58 thus collected, and another item of \$98, lost by him, Mrs. Morton, at the request of her husband, made the assignment in question, on the agreement that Decker would forbear to arrest Morton, would continue him in his employment, and would pay his salary over to her instead of to him. The agreement was completed, and payments were made to Mrs. Morton, amounting to \$800. On the return of

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the citation, Mrs. Mary E. Gamble appeared and claimed a share in the estate of the deceased, as his second cousin. She was the daughter of John M. Stockbridge. Benjamin K. Stockbridge, a son of J. M. Stockbridge, also claimed a share in the estate. He gave evidence as to the general reputation in the family of a marriage between his father and Delia M. Bryant, and the recognition of the relationship between himself and the deceased, who was his father's cousin. He also proved, by witnesses, a general reputation of marriage between his father and mother, and gave in evidence the following memorandum, in his father's writing, as follows :

MONROE, February 1, 1846.

This is the thirty-fourth birth-day of my wife, Delia. We have passed many sunny days together ; many bright days without a cloud ; and, tho' poor in purse, we were rich in each other. She has saw the day clouded by intemperance and profanity ; she has seen the sun of hope rise in all its glory and splendor ; and, again, she has seen the black cloud of despair almost shroud it from her vision ; but her hope was in the living God, who would never leave nor forsake her. Dear one, may she forget all clouds and remember sunshine only, for she has been a bosom friend to me indeed. "If any be overtaken in a fault, forgive, as Christ also forgave us. Amen."

The following letter was read in evidence, to show reputation in the family.

———, March the 14, 63.

EVER DEAR NEPHEW :

I take my pen to answer your letter, which I received about an hour and a half ago. I was glad to hear from you. I began to think you had not got my letter, or was forgetting me. We are all well, except myself. I am not very rugged this winter, although I keep about. You wished me to give you all the information in regard to your father and mother's marriage together. They were married together in the year 1829, in the fall, October or November. Our family record

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in our old bible, I think, was destroyed by fire when your mother was in Utica, at your aunt Leary Smith's. The reason I recollect so well when they were married, your grandfather Bryant, my father, died the 5th of January, 1830, about two months after they were married. Your mother was very young; I think she lacked about two or three months of seventeen years. When she was married I was about twelve years old. Your father lived with your grandfather for more than a year before they were married. He came to our house in pursuit of work. He worked a short time, and then your grandfather hired him for a year, for fifteen dollars a month. He stayed his time out, and they were shortly after married. A man by the name of Thorp took them for a ride, and they were married, returned home at night, and the next day they started to go to live in Colebrook. Your dear mother I know was married lawfully to your father, as well as I know that I am in existence. I trust she was a true child of God. I must tell you I had a letter from Old Sheffield, Berkshire Co., the other day, from a cousin. She wished I would tell her where your aunt Lucy children and Delia's children were. I told her where you were, my dear Benjamin. If prosperity is yours, let the fear and love of God dwell in you, as one that loves you dearly. I beg of you, cleave to the Lord; let him guide you in all your ways. I feel I cannot give you up. Seek the Lord while he may be found; call upon him while he is near. If temptation assail you, ask strength of the Lord; he knows how to succor those that are tempted. The love of money is the root of all evil, which some loveth, hath pierced themselves through with many sorrows. If you are prospered, and have property fall to you, I hope you will put it right into a farm, or some little home. You will not regret it when you are old. Remember me to your wife and little one. May you long be spared to be a blessing to each other. Kiss your little one, for I hope to see you some day; and write soon.

Yours truly, from your aunt,

M. J.

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Mrs. Gamble proved a ceremonial marriage between her mother and John M. Stockbridge, of a date some years earlier than his acquaintance with Miss Bryant. She gave in evidence a marriage certificate signed by Rev. Dr. Maclay, and the original parochial register kept by that clergyman, in the possession of his executors. It appeared that Stockbridge and her mother lived together for a number of years, and that he subsequently abandoned his home, some time before his alleged marriage with Miss Bryant.

JOHN N. LEWIS, for Decker.

I. The surrogate has not jurisdiction to inquire into the consideration of the assignment. It is valid on its face, imports a consideration, and was duly executed and delivered. He should recognize the assignee as owner of the fund, and leave Mrs. Morton to her action for money received. This is not a case of an executory contract. The assignment was absolute, and effected an immediate transfer of all Mrs. Morton's interest in the estate.

II. The chief objection urged to the assignment is, that it is an agreement to compound a felony, and, being prohibited, can constitute no consideration for the assignment.

III. It does not clearly appear that any facts alleged against Morton, if proved, amount to felony. (2 *Rev. Stat.*, 1 ed., 678, § 59.) 1. There is no strict proof that Morton was of the age of eighteen years at the time of the acts complained of. 2. Nor that he converted to his own use more than \$25 at any one time. Embezzling \$25 or under is not punishable by imprisonment in State Prison, and so is not felony. (2 *Rev. Stat.*, 1 ed., 678, § 59; *Id.*, 679, § 63; *Id.*, 690, § 1.) 3. Every presumption is in favor of innocence; and the claimants are entitled to the strictest construction of the evidence in their favor. (*Clayton v. Wardell*, 4 *N. Y.*, [1 *Comst.*], 230; *Best on Pre.*, 31 *Law Lib.*, *N. S.*, 58.)

IV. It does not appear that Decker had knowledge of the facts constituting the acts of Morton a felony. Unless he knew all the facts showing the commission of the offence, he

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is not within the prohibition. (2 *Rev. Stat.*, 1 ed., 689, § 18.)
1. There is no strict proof that he knew Morton to be eighteen years of age. 2. Or that he had misapplied a sum exceeding \$25 at once.

V. Granting that the release, if it rested solely on a promise not to institute criminal proceedings, was void, yet there was sufficient consideration to support it, aside of such promise. 1. There was an agreement to continue Morton in employment. 2. Also to pay his salary to his wife, the contestant. 3. And sufficient pecuniary consideration under this stipulation is shown by the actual payment to the wife of an amount far exceeding the value of her distributive share.

VI. There was no agreement to compound or conceal the offence, if any had been committed. 1. There was no agreement to abstain from a *criminal* prosecution. This would be essential. In *Ward v. Lloyd* (6 *Mann. & Gr.*, 785), defendant was plaintiff's clerk, and converted moneys collected. Plaintiff *threatened* a prosecution, and defendant gave a bond and warrant of attorney: the court could not set it aside, because there was no proof of an agreement. 2. Since the Code of Procedure, Decker had a civil remedy against Morton for any moneys he might have appropriated. This remedy he could pursue unembarrassed by the existence of the concurrent criminal remedy. He had a perfect right to compound or settle his civil action against him. In *Keir v. Leeman* (6 *Q. B.*, 321), the prosecutor compromised a prosecution for a riot. It was held illegal, because the offence was of a public nature. The party might compromise "all offences for which he might recover damages." In *Harding v. Cooper* (1 *Starkie, N. P.*, 467), it was held that a stipulation to drop a prosecution was illegal, but if the party compounds his *civil* rights only, it was not. 3. In speaking of "arresting" Mr. Morton, Mr. Decker must be deemed to have spoken of his own right to have him arrested in a civil action, and not to the right of the *people* to have him arrested in a criminal proceeding. Language capable of a twofold construction should be construed in favor of

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innocence. (*Bank of Silver Creek v. Talcott*, 22 Barb., 550; *Wilson v. Betts*, 4 Den., 201; *McPherson v. Chrandal*, 24 Wend., 25; *Smith v. Joyce*, 12 Barb., 21; *Starr v. Peck*, 1 Hill, 270; *Rea v. Trowning*, 2 Barnw. & Ald., 386. See *Rodwell v. Redge*, 1 Carr. & P., 220; *Gleadow v. Atkin*, 1 Carr. & M., 458.)

B. D. PENFIELD, for Mrs. Morton.

I. The surrogate cannot order the amount of Mrs. Morton's interest to be paid to the assignee, unless satisfied of the validity of the assignment. He cannot have, even were it not disputed, any knowledge of the assignment until it is produced in evidence before him; nor can he pronounce upon its validity until he has tried the question, by inspecting the paper and taking proof of its execution. Assuming, then, that the assignee has acquired a standing in this court, and that the surrogate rightfully received proof of his claim, how can it be consistently argued, that by reason of a want of jurisdiction over the subject-matter of the controversy, he was bound to exclude the evidence of the assignor in opposition? Either the surrogate has jurisdiction to determine all the rights involved in the controversy, or he has no jurisdiction. If he has no jurisdiction, the claimant has no standing in court, for he belongs to neither of the classes of persons entitled to share in the distribution of the estate. (See 3 Rev. Stat., 5 ed., 182, § 78.)

II. The assignment is clearly illegal and void: for, 1. It was connected with and grew out of an illegal act. (2 Kent's Com., 486; *Pratt v. Adams*, 7 Paige, 615; *Leavitt v. Palmer*, 3 N. Y., 19.) 2. The consideration of the assignment was a promise not to prosecute Morton, who had been guilty of a felony, and was intended to defeat the object of the statute (3 Rev. Stat., 5 ed., 969, § 18) prohibiting the composition of criminal offences. (*Nellis v. Clark*, 4 Hill, 424; *Chitty on Cont.*, 273; *Addison on Cont.*, 96; *Gray v. Hook*, 4 Comst., 449; *Bell v. Leggett*, 3 Seld., 176.) 3. It not only violates the statute before cited, but it is subversive of the

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soundest principles of morals and public policy. (*Daimouth v. Bennett*, 15 *Barb.*, 540; *Steuben Co. Bank v. Mathereson*, 5 *Hill*, 249; *Story's Eq. Jur.*, § 249; *Callagan v. Hallett*, 1 *Cai.*, 104; *Reg. v. Best*, 2 *Mod.*, *C. C. R.*, 124; *Com. v. Pease*, 16 *Mass.*, 91; *Chitty on Cont.*, 582, 570.)

III. The promise to continue Morton in his employment, and to give to Mrs. Morton the control of his salary, was coupled with the promise not to prosecute him, and to conceal the embezzlement; and those promises taken together formed the consideration of the assignment. The agreement is entire, and is tainted with the illegality of the latter promise, and is therefore void. (*Addison on Cont.*, 147; 2 *Pars. on Cont.*, 380; *Rose v. Truax*, 21 *Barb.*, 361; *Burt v. Place*, 6 *Cow.*, 431.)

IV. Decker is concluded by the declarations made by him at the time of the transaction—to wit, that Morton had collected and wrongfully appropriated this \$1,361.34, or in other words had embezzled it. He is now estopped from denying the truth of what he then asserted. The declarations were acted upon. The assignment was given in consequence of them. (*Greenl. Ev.*, § 207; *Dezzell v. Odell*, 3 *Hill*, 215; *Truscott v. Davis*, 4 *Barb.*, 495; *Martin v. Angell*, 7 *Id.*, 407; *Otis v. Sill*, 8 *Id.*, 102; *Welland Canal Co. v. Hathaway*, 8 *Wend.*, 483.) It is not material whether the declarations were true or false, they were believed and acted upon. (*Greenl. on Ev.*, § 208.)

V. If the claimant is now permitted to say that his declarations at the time of the transaction were false, the assignment is void for fraud. They cannot plead ignorance of the truth of the charges. It was their duty to know their truth before making them.

MOSES ELY, for B. K. Stockbridge.

WALTON & SHEARMAN, for Mrs. Gamble.

THE SURROGATE.—The assignment alleged to have been made by Amelia D. Morton, herein, is void for want of a

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legal consideration. And it is decreed that the residue of the assets of the estate of George H. Powell, deceased—to wit, the sum of four hundred and sixty-one dollars and ninety-six cents—be distributed as follows; that is to say: to Amelia D. Morton, cousin of said deceased, the sum of one hundred and seventy-two dollars and thirty-four cents, which, with the sum of one hundred and seventeen dollars and twenty-three cents heretofore received by her, will be in full of her distributive share from said estate on this accounting.

Benjamin K. Stockbridge is not entitled to any share in the estate of the deceased, which must be divided equally, after payment of expenses between Mrs. Morton and Mrs. Gamble, allowing for payments already made to the former.

An appeal was taken from the surrogate's decree to the Supreme Court (November Term, 1863), where an opinion was delivered by INGRAHAM, J.

BY THE COURT.—INGRAHAM, J.—On a final accounting before the surrogate, Mrs. Morton claimed, as one of the next of kin, a distributive share of the estate; and Decker claimed the proceeds of such share under an assignment from Mrs. Morton to him. The validity of the assignment was denied by the defendant, and the surrogate decided that it was illegal and void, and decreed payment to the defendant. From this decree the plaintiffs appeal.

It is not clear that the surrogate had any jurisdiction to try the question as to the validity of the assignment. The proper course for the plaintiff (the assignee) was, to have brought an action on the assignment in a court of law; or to have had a reference under the statute, and had the rights of the parties there adjudicated. If they neglected to take this course, and leave the administrator to settle his accounts with the assignor, they cannot afterwards ask the surrogate to try a question of this kind on the accounting.

But upon the merits, I think the surrogate, if he had jurisdiction, did not err. The assignment was made by the wife

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to save her husband from prosecution, for what, if proved, would have amounted to a felony. It was given under a threat of prosecution, and to send the husband to prison if the assignment was refused. The suggestion, that the evidence was not sufficient to convict Morton, if on trial, and therefore not sufficient to affect the validity of the assignment, might be available under a different state of facts. In the present case, the execution of the assignment was obtained by the representations of the plaintiff that the offence had been committed, and that he would imprison Morton if the assignment was not executed. When the representations on which the paper was executed are such as to lead the party to act on the suggestion that a felony had been committed, the party making them is concluded as to the truth of such statements, and he cannot be allowed to sustain the validity of the assignment by alleging such declarations to be untrue. They were acted upon by the party who executed the assignment, and the truth of them cannot be denied.

It was urged, on the argument, that part of the consideration was legal, and therefore the contract could be enforced. But the contrary is the rule. In *Rose v. Truax* (21 Barb., 361, 379), it was held that "where an entire agreement contains an element which is legal, and one which is void, being against public policy, the legal consideration cannot be separated from that which is illegal and void."

Decree reversed, and case sent back to the surrogate to correct the accounting as above stated, with costs against plaintiffs.

SUTHERLAND and LEONARD, JJ., concurred.

DOBKE v. MUNRO.

NEW YORK COUNTY—HON. GIDEON J. TUCKER, SURROGATE—January, 1863.

DOBKE v. MUNRO.

In the Matter of the Probate of a Paper propounded as the Will of JOHN MUNRO.

In the absence of any proof of fraud, or mistake, or accident, a decree rejecting a will propounded for probate, will not be opened on the grounds that the counsel engaged were incompetent, or that the attesting witnesses, not being familiar with the English language, did not, on the hearing, fully understand questions put to them in that language, as to the due execution of the instrument propounded. The proper remedy is by appeal.

In a proceeding in the Surrogate's Court, the original decree is the paper signed by the presiding officer of the court, written out on a sheet or sheets of paper.

The record or minutes, kept in pursuance of the statute, is merely the enrolment of the decree, which should conform to the original decree, and may be made to do so on motion. No signature is required to this record.

An original decree is not irregular and void, merely because the title of his office is not affixed to the name of the acting surrogate signed to it.

When the surrogate's decree refusing probate will be opened—stated.

The petitioners, Catharine Dobke and Gustavus Pheiffer, sought to obtain an order rescinding the conclusions of acting-surrogate Daly, and to open a decree, entered by him, denying probate to a paper propounded as the last will and testament of John Munro, deceased.

B. J. BLANKMAN, *for Petitioners.*

FULLERTON & STEVENSON, *opposed.*

THE SURROGATE.—This is a petition reciting circumstances which are alleged to have attended the rejection, by Acting-Surrogate Daly, of the paper propounded as the will of John Munro, deceased, and praying that the Surrogate's Court will "rescind its conclusion, and receive additional evidence" upon the probate of the will. The petitioners are

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the persons named in the paper so propounded and rejected, as executrix and executor.

The Revised Statutes (3 *Rev. Stat.*, 5 ed., 142, 162-164) empower this court to revoke letters of administration or of guardianship, in certain cases, or to revoke probate of a will, upon allegations, filed and proven by next of kin, made within a year. [For an instance of this latter, see the Matter of the Will of John Mason, Surrogate's Minutes, vol. 11, p. 182, and vol. 12, p. 50, and pp. 108 to 193, and decree, p. 194.]

The powers of courts of probate, so learnedly reviewed by my predecessor (*Brick's Estate*, 15 *Abbotts' Pr.*, 12), have also been shown to extend to the revocation of certain acts there enumerated under the following heads, viz.: I. Where a decree had been obtained by collusion or fraud. II. Where a later will was produced. III. Where the supposed testator was found to be alive. IV. Where a mistake had been made by oversight or accident. V. Where a legatee, whose existence was not known, appeared after decree for distribution, but before actual distribution. VI. Where the court had acted without obtaining jurisdiction of the person, as where a party in interest had not been cited, or where an infant had no guardian. VII. Where an order made had not been entered. VIII. Where any act or proceeding was irregular or void; or, IX. Where (in the ecclesiastical courts, whence our practice is derived) a conclusion had been arrived at and announced by the court, but the decree was not definitely settled and entered, and the court would still, on due cause shown, "rescind its conclusion."

I. Does this application come under the first of these heads? The answer to this must be in the negative—no collusion or fraud has been shown or attempted to be shown in the course of the proceedings.

II. Does it come under the fourth of these heads? Has there been, on the part of the court, any oversight or accident?

The petitioners propounded their alleged will in due form, and were represented before the surrogate by counsel. I

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cannot investigate the competency of counsel, nor decide whether he was able to take care of the interests of his clients. In the contemplation of an officer holding a judicial position, all persons entitled to practice before him must be absolute peers and equals. Nor is there any evidence, indeed, that this counsel was not as able as any member of his profession. Their witnesses did not prove the case, as clearly appears from their evidence. They positively swore that certain requisites which, by statute, are indispensable to the execution of a will, were not complied with. No surrogate or probate judge could have allowed probate upon the testimony of these witnesses.

The petitioners now allege in their petition that these two subscribing witnesses were Germans, not familiar with the English language; that they did not fully understand the questions put to them, and therefore did not testify as to the execution of the paper, "according to the proper and rightful manner of the same," nor in accordance with the facts. They also allege that other witnesses who were present were not permitted to be called; but that the acting-surrogate peremptorily refused to admit the will, and rejected the same.

The examination appears to have been taken in English, but it does not appear by it that the witnesses were unable to understand or to reply intelligibly to the questions. If they "repeatedly requested to have an interpreter," as one of them, Matty, now swears, the request could not have been made or communicated to the acting-surrogate. If these witnesses were now to be recalled and allowed to give evidence different from, and contradictory of their former testimony, they would scarcely be worthy of credence. They clearly proved then that the will was not duly executed. Nor could other witnesses, according to the rules of evidence in this court, have been called to prove the execution after they had failed.

I am compelled to say, therefore, that I find no traces of any mistake, by oversight or accident, committed by the court.

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III. But it is also claimed that the "act or proceeding" purporting to be a decree denying probate was "irregular and void," under the eighth head as above; and it remains to consider whether, in point of law, a "conclusion," only, has been arrived at by the court, which it would be still in my power (see the ninth head) to "rescind." It is claimed that the decree is void, because the officer then holding the Surrogate's Court is not correctly designated in it; and because it is not signed at all, or is signed "C. P. Daly," without the addition of any title of office. It has been insisted by counsel, on the argument, that the record or minute lying in this office is the original decree, and must be so treated and considered.

With respect to this, the practice has been long and surely settled. The original decree is the paper signed by the presiding officer of this court, written out in a sheet or sheets of paper. The record or minutes, kept in pursuance of the provision of the Revised Statutes (3 *Rev. Stat.*, 5 ed., 365, § 13, subd. 4), is the enrolment of the decree, which should conform to the original decree, and may be made to do so, at any time, on discovery of omission or error, *nunc pro tunc*. In this case, the original decree reads in its caption, "at Surrogate's Court," &c., "Present, Charles P. Daly, first judge of N. Y. Common Pleas, and acting surrogate." This is a designation of office strictly in accordance with the act of July 21, 1853, which directs that where the surrogate is a distinct officer from the county judge, the latter, when acting as surrogate, shall be designated by his official title, with the addition of the words "and acting surrogate." It is of no consequence that the minute or record of the decree, made by the recording clerk, has omitted to give this entire title, and that it is written in the book, "Present, Charles P. Daly, surrogate." The error in copying is amendable, and I shall direct it to be amended.

The signature "C. P. Daly" is upon the original decree. There is no signature to the record or minute of the decree, nor is it ever required. That Judge Daly's designation of

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office was not added to his name at the foot of the original decree is also an amendable error, and may be supplied at this time.

It would be strange and difficult if I were unable to take official cognizance of the fact of Judge Daly's holding this court, and discharging, under the statute, the duties of the office of surrogate, during the recent vacancy in it. To disturb or discredit a large body of decrees, orders, minutes, and records, upon slight verbal points, would be an act highly contrary to public policy, and injurious in the highest degree to the general interest.

I must consider the decree as valid; and I cannot find that a decree rejecting a will propounded for probate was ever opened in the practice of this court, though such a decree has been reversed on appeal, and the will ordered admitted to probate. An appeal was the only remedy of these petitioners. Their petition must be dismissed with costs.

NEW YORK COUNTY—HON. GIDEON J. TUCKER, SURROGATE—January, 1868.

COWLES v. THOMPSON.

*In the Matter of the Estate of ABRAHAM G. THOMPSON,
deceased.*

The provision of 2 Rev. Stat., 116, § 19,—authorizing a creditor, having a judgment against an executor or administrator, to obtain an order against the executor or administrator to show cause why an execution should not issue on such judgment,—does not refer solely to judgments for debts of the deceased. But a creditor having a judgment against an administrator for legal services rendered by him in the administration of the estate, is entitled to such an order.

An administrator having funds in his hands, to which he is lawfully entitled to resort for the payment of the just and necessary expenses of the administration, cannot refuse so to apply the fund, on the ground that there is not sufficient assets to satisfy in full all the debts of the estate.

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Thus, where, on an accounting by the administrator, it appeared that there were assets of the estate sufficient to satisfy a judgment obtained against the administrator for legal services rendered in the administration, and to pay all other probable expenses of the administration, although not enough to pay more than a proportion of all the debts;—*Held*, that a decree will be granted that the administrator pay out of the estate the amount of the judgment, with interest and costs.

In order to make the judgment a "debt" against the estate, within the meaning of the statute, so that it must abate with the other debts due from the estate, in consequence of the deficiency of assets, it would be necessary that the services, for which the judgment was obtained, should have been rendered to the testator in his lifetime.

It seems, that if the creditor shall so require, the surrogate may proceed further, and direct that an execution issue. (Per LEONARD, J.)

Edward P. Cowles recovered a judgment, February 27th, 1862, in the Supreme Court, against Edward G. Thompson, as administrator with the will annexed, of Abraham G. Thompson, for \$2,000.

The judgment not being paid, Cowles applied to the surrogate by petition, and obtained from him an order or citation, requiring said administrator to render an account of his proceedings as such, and show cause why he should not be ordered to pay the judgment; or why an execution should not be issued upon it to collect the amount due upon it; and why he should not render an account of his acts and doings, and of the moneys in his hands. By the account, as rendered, it appeared that the administrator had in his hands sufficient assets to pay the judgment of Mr. Cowles in full, but that he had not sufficient assets to pay it in full if the moneys in his hands were to be divided up, *pro rata*, among all the creditors of the estate.

E. P. COWLES, and EVARTS, SOUTHMAYED & CHOATE, *for Creditor.*

BLATCHFORD, SEWARD & GRISWOLD, *for the Administrator.*

THE SURROGATE.—This is an application under the provisions of the Revised Statutes, conferring on the surrogate power to compel payments by an administrator. The petitioner, after a trial at law upon the merits, recovered on the

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27th February, 1862, a judgment in the Supreme Court, against Edward G. Thompson, administrator with the will annexed of Abraham G. Thompson, for the sum of two thousand dollars, "to be made, levied, and collected from the goods, chattels, and assets, lands and tenements of the estate of Abraham G. Thompson, deceased." This judgment was for professional legal services rendered to Henry Shelden, the former executor of the estate, in and about the administration of the estate. The judgment-creditor now petitions the surrogate that the present administrator with the will annexed account, and that he be decreed to pay such judgment from the assets of the estate; or, that an execution may be issued on such judgment, or for such other relief, &c. The petitioner claims this judgment to be a part of the necessary expenses of administration, and that, as such, it should be paid in full, in precedence or even in exclusion of all debts of the testator.

On the other hand, the administrator insists that the judgment in question is merely a debt of the estate of the fourth class under the statute, and that execution can only issue for the sum that shall, upon the administrator's accounting, have appeared to be a just proportion of the assets applicable to the payment of such a debt. It appears that there are assets of the estate sufficient to pay this judgment and all other probable expenses of administration, but not enough to pay more than a proportion of all the debts.

The section relating to the settlement of accounts of executors and administrators, and the allowance of their commissions, &c., provides that "in all cases such allowance shall be made for their actual and necessary expense as shall appear just and reasonable."

In this case, the Supreme Court has declared that \$2,000 was a "just and reasonable allowance" for the "actual necessary expense" of counsel-fees, and that that amount is due to Mr. Cowles, by the estate.

In order to make the judgment a "debt" against the estate, within the meaning of the statute, so that it must abate

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with the other debts due from the estate in consequence of the deficiency of assets, it would be necessary that the services for which the judgment has been obtained should have been rendered to the testator in his lifetime.

The remedy of the petitioner is a decree of the surrogate that the administrator pay out of the estate the amount of this judgment, with interest and costs; upon which decree, docketed according to law, execution can issue. Decree accordingly.

An appeal was taken by the administrator to the general term (February Term, 1864);—present, SUTHERLAND, LEONARD, and CLERKE, JJ., where the decree of the surrogate was affirmed, with an opinion by LEONARD, J.; Justice CLERKE, concurring, and Justice SUTHERLAND, dissenting.

LEONARD, J.—The surrogate has ordered the administrator of the estate of Abraham G. Thompson, deceased, to pay to Edward P. Cowles the amount of a judgment recovered by him in the Supreme Court against the said administrator, after a trial at law on the merits, for services rendered by him as proctor and counsel for Henry Sheldon, the former executor of the said estate, in the administration thereof, amounting to two thousand dollars.

This recovery adjudges that the services in question constitute actual, necessary, just, and reasonable expenses of the administration, which must be borne by the estate.

It is provided by the Revised Statutes, part 2, ch. 6, tit. 3, art. 3, sec. 58 (*3 Rev. Stat.*, 179, § 64, 5 ed.), that such expenses shall be allowed on the settlement of the account of an executor or administrator.

The administrator or executor is to be allowed, in his account, for his services and expenses, before all other claims.

Title 5, section 19, of the same chapter, authorizes a creditor, having a judgment against an executor or administrator, after a trial at law upon the merits, to obtain from the surrogate an order against such executor or administrator to

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show cause why an execution should not issue on such judgment.

The next section directs the surrogate to issue a citation, requiring the executor or administrator complained of, to appear and account before him; and if, upon such accounting, it shall appear that there are assets in the hands of such executor or administrator, *properly applicable, under the provisions of chapter six*, to the payment of the judgment, the surrogate is further directed to make an order that execution be issued for the amount so applicable.

These provisions appear to be distinct and easily comprehended.

There is no difference in respect to the authority conferred upon the surrogate under the two sections last referred to, whether the judgment was recovered for a debt of the deceased testator or intestate, or for a debt contracted by the executor or administrator for actual, necessary, just, and reasonable expenses of the administration. It is insisted by the learned and ingenious counsel for the administrator, that the surrogate is not authorized to direct the payment of these expenses out of the estate, and that the estate does not become chargeable therefor in such manner that the assets in his hands are properly applicable to the payment thereof, under the provisions of the sixth chapter of the statutes above referred to, until the expenses have been actually paid by the administrator.

This position is fallacious. It cannot be admitted that an administrator can hold a fund in his hands to which he is lawfully entitled to resort for the payment of the just and necessary expenses of the administration, and refuse, at his pleasure, so to apply the fund as to set the creditors at defiance.

It may be conceded, as the appellant's counsel insist, that the administrator who employs the services of counsel in the necessary defence or collection of his trust, is personally liable for the payment thereof; but the estate is also liable, and it is not the privilege of the administrator to decide whether

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he shall be made liable in his personal or representative capacity. That election is to be made by the creditor, if the right of election exists, and not by the debtor.

In whichever capacity the administrator is required or compelled to pay the just and necessary expenses of his trust, he is entitled to have the amount refunded from the estate, and allowed by the surrogate on the settlement of his account.

The learned counsel for the appellant clearly errs in urging that the authority of the surrogate under sections 19 and 20, above mentioned, refers only to judgments recovered for debts incurred by the deceased.

The provisions of chapter 6, in which those sections are embraced, relate to and provide for the payment of the services and expenses of the executor or administrator, just as distinctly as for the debts of the deceased; and a judgment for such expenses is clearly within the provisions of the section last mentioned.

The order of the surrogate should be affirmed, with costs.

In my opinion, it is the duty of the surrogate to proceed further than he has done by his order, if the creditor shall so require, and to direct that an execution issue.

OSWEGO COUNTY—HON. AMOS G. HULL, SURROGATE—December, 1863.

IRWIN v. IRWIN.

In the Matter of the Probate of the Last Will and Testament of JAMES G. IRWIN, deceased.

Both of the attesting witnesses swore positively that neither the testator nor any other person present declared, at the execution, that the paper propounded was the testator's last will and testament, although a person who superintended the execution testified to the contrary. *Held*, that probate must be refused.

It cannot help the case that an attestation clause was read in the presence of the testator and of the witnesses, where one of the latter swears positively that he did not hear the same and knew not the nature thereof.

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James G. Irwin died in January, 1863, leaving a will, which was offered for probate. The widow of the deceased objected to the probate, on the grounds that the will was not properly executed, and that there was not a sufficient publication of the instrument.

It appeared by the testimony of John Hunter, who drew the will; that he read the will to the testator, and then told him to call his witnesses. The testator went to the door and called in Henry White and James H. Irwin. Hunter then said to the witnesses, "We want you to witness this will." The testator signed the will in the presence of the witnesses. Hunter testified that he held the will in his hand, and asked the testator "if he acknowledged that signature to be his signature to his last will and testament," and the testator answered "yes," though he would not swear positively that he used the words "last will and testament."

Both of the subscribing witnesses swore positively that the words used by Hunter were, "Do you acknowledge this to be your signature, Mr. Irwin?" White swore that he was positive Hunter did not use the words will and testament; and the other subscribing witness, James H. Irwin, testified, "My father said nothing about that being a will, nor did I hear any one then speak of it as a will; I did not know what I had been signing, or the nature of the paper." Mrs. McFarland, who was present, testified that she "heard nothing about a will or testament then, or on that day."

Hunter testified that he read the attesting clause aloud, in his ordinary tone of voice; while White swore that he read it in a very low tone, not loud enough for a person to hear at a distance of five or six feet. Hunter sat some eight feet from the testator when he read the clause. The other subscribing witness swore that he thought Hunter read something to White in a low tone of voice,— "which I could not hear." White testified that he knew, at the time, that the testator had not requested him to sign it, and that he had not declared it to be his last will and testament. Nothing was said about witnessing a will. The testator said nothing about a

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will in the hearing of the witnesses. The other subscribing witness corroborated the testimony of White.

MARSH & WEBB, for Contestants.

I. The instrument presented for probate in this case was not published as a will, as required by subd. 3 of section 35, of 3 Rev. Stat., 144, and is therefore not a will.

II. This is not a case where the subscribing witnesses do not remember one way or the other, but where they give affirmative proof that the instrument was not published as a will; and the attestation clause does not relieve the difficulty. (*Lewis v. Lewis*, 13 Barb., 17; *Remsen v. Brinkerhoff*, 24 Wend., 825; *Exp. Beers*, 2 Bradf., 163.)

III. The publication must be made to each of the witnesses. (*Seymour v. Van Wyck*, 2 Seld., 120.)

IV. The testator is bound to know that the witnesses know the testamentary nature of the act, and *vice versa*. The minds of the parties must meet on that point. (*Wilson v. Hitterick*, 2 Bradf., 427; *Exp. Beers*, 2 Id., 163; *Lewis v. Lewis*, 11 N. Y., 220.) Whatever may have been said by Hunter, the subscribing witness, James H. Irwin, knew of no publication of the will, and therefore it is not a will under the statute.

E. S. PARDEN, for Proponents.

THE SURROGATE.—The testimony in this case fails to show a sufficient publication.

It is unlike the cases where the subscribing witnesses fail to remember what occurred. Here they expressly swear that the vital requisites to the valid execution of the will did not occur.

Our statute goes further than the English statute in respect to the publication of the will. Our courts hold parties to a strict compliance with the statute in this respect.

In the case of *Lewis v. Lewis* (1 Kern., 220), the testator said, "I declare the within to be my free will and deed," yet

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the court held that such a declaration was not a sufficient declaration that the instrument was his last will and testament.

The probate of the instrument must be denied.

OSWEGO COUNTY—HON. AMOS G. HULL, SURROGATE—December, 1868.

NELSON v. EATON.

In the Matter of the Distribution of the Proceeds from the Sale of the Real Estate of WILLIAM S. EATON, deceased.

The contract of an infant may be avoided by those only, besides himself, who are privy in blood or estate.

C., an infant, by a deed of gift, granted to his sister all his right, title, and interest in and to his father's estate, and died before attaining his age. His brother W. assigned all his interest, both in his father's and in C.'s estate, to N.

Held, that N. had such an interest in the estate as entitled him to disaffirm C.'s deed, on the ground of infancy.

The facts as agreed upon, and the claims of the respective parties in this case, were as follows :

The proceeds for distribution were the moneys arising from the sale of real estate under the decree of the surrogate of Oswego county, for the payment of the debts of the deceased. It was admitted that the deceased left three children—viz., Wellington Eaton, of full age; Carlos Eaton, aged about nineteen, at the time of his father's death, which occurred in 1854; and Ellen, aged fourteen years at the time of her father's death. Carlos died in January, 1855, at about the age of twenty, without issue, leaving no widow; and the mother of the children died before the father.

Ellen was nearly fifteen years of age at the time of the decease of Carlos.

In December, 1854, Carlos executed and delivered to his sister Ellen a deed of all his right, title, and interest in and

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to the land and estate, from the sale of which the money for distribution in this case was derived.

On the same day, he also executed and delivered a contract to Ellen, intending to convey all the right he had to said land,—agreeing in the same contract to convey by deed, and to confirm the contract, if he should live until he should arrive at full age. It was agreed by the parties that such deed and contract were designed as a gift. Carlos died on the 11th of September, 1855.

The other brother, Wellington, in October, 1855, in consideration of six hundred dollars, conveyed all of his right, title, and interest in and to the land of his father, and all his right, title, and interest to the undivided half of the estate of which Carlos died seized, whatever it might be, to one Nelson (conveying all the interest that he, Wellington, individually, or as an heir of Carlos, might have in said estate).

Ellen, by her guardian, claimed that Carlos died seized of no property, for the reason that he had conveyed it to her. It was also admitted, on the hearing, that at the time Wellington executed the deed to Nelson, he informed Nelson that Carlos had executed a deed of his interest to Ellen. It was claimed, on the part of Nelson, that he was entitled to one half of the proceeds for distribution, and that the deed from Carlos to Ellen was inoperative and void.

It was claimed, on the part of Ellen, that she was entitled to two-thirds of the amount for distribution; that is to say, the share that she would have as one of the three heirs to the estate of her father, and also the share that she derived from purchasing the estate of Carlos.

S. N. DADA, *for Infant.*

R. H. TYLER, *for Nelson.*

THE SURREGATE.—It is insisted, on behalf of Ellen Eaton, that Nelson is not in a position to avoid the deed. That if Wellington, Nelson's grantor, was ever in a position to disaffirm the contract on the ground of the infancy of his brother,

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that Ellen would have as much right to insist on the affirmance of the contract, as Wellington would to have the same avoided.

This case then fairly presents the question: What parties, besides the infant, may avoid a contract made during infancy? If sympathy could ever be allowed to be a guiding motive in courts of equity or courts of law, the claims of the daughter Ellen, in this case, would have great weight in determining this controversy. But such emotions must be disregarded in judicial tribunals. General rules must not bend to meet individual cases of hardship.

There are very few adjudications bearing upon this question in this State.

LORD MANSFIELD, in the case of *Zouch v. Parsons* (3 Burr., 1794), cites and approves the doctrine laid down by Perkins, in these words: "We think the law is, as laid down in Perkins, that all gifts, grants, or deeds, made by infants, by matter in deed, or in writing, which do take effect by delivery of his hand, are voidable by himself, by his heirs, and by those who have his estate."

The same doctrine is approved in the case of *Fonda v. Van Horne* (15 Wend., 631), and in the cases there cited.

The doctrine which appears to control this case, is laid down in 2 *Hilliard on Real Property*, at page 431, viz.: That the deed of an infant may be avoided when he attains his age, and by those who are privy in blood, or estate, but not by a stranger. Nelson having the *estate*, has the right to disaffirm the contract. It may be said to have been disaffirmed also by Wellington Eaton, when he conveyed to Nelson.

Taking this view of the case, I must distribute one half of the proceeds to Ellen and the other half to Nelson.

I N D E X.

ABANDONMENT.

See MARRIAGE, 4, 5, 7, 8.

ACCOUNTING.

1. An administrator's account ought to present clearly, so as to be seen at a glance, results in reference to which the decree is final, so as to enable the court readily to make the abstract required by law; and an omission to do so is ground of legal suspicion: but an account cannot be rejected, merely because it mingles with statements as to personal property, statements as to the proceeds of real property. *In re Place*, 276.
2. The account of proceedings required of an executor or administrator must be such an account as, when rendered, may be finally settled. *In re Jones*, 263.
3. The account must state, as part of the executor's proceedings, when the inventory was filed, when the advertisements for claims were published, what claims were allowed, what disputed and what rejected by the executor, and the time and manner in which they were rejected or disputed; what suits, if any, have been commenced on such disputed or rejected claims; which of them have been determined, and how; and which are pending, and the amount claimed; also what claims have been presented and allowed since the expiration of the advertisement for claims. If no such claims have been rejected or disputed, and no suits commenced, it must be so stated. All these things are essential in the account. It is material also that the character of the debts paid, or allowed, or prosecuted, should be stated—that is, whether judgments docketed, &c., or debts of inferior class. *Ib.*

4. The executor must first charge himself with the amount of the inventory; then with "the increase" of the inventory for any cause, whether direct or indirect, whether it be the increase of the flock, from interest, from selling at a higher price than the appraised value, or it be the increase from any property not embraced in the inventory. If there is no increase, that fact must be stated. He may credit himself for articles lost or perished, stating the cause of the loss; with the decrease, and with debts due the estate not collected, stating the facts justifying the credit given; with the funeral charges and expenses of administration; with moneys paid to creditors, naming them; and then, with payments to legatees and next of kin. He must state the ages, condition in life of females, of legatees, and next of kin: and if any are minors, the fact must be stated, and whether they have guardians; and if so, their names, residences, and how appointed. He must also produce vouchers supporting each payment; or in case of claims under \$20, in lieu of vouchers, his own oath of payment. *Ib.*
5. The executor is accountable only for what he has actually received as proceeds of sales; and where real estate, subject to a power of sale by the executor, has been sold under a decree of a Court of Chancery, and the proceeds paid over to the heirs by order of that court, the executor is not bound to account for such proceeds in the Surrogate's Court. *In re Vandervoort*, 270.
6. The testator, at the time of his death, was domiciled in Connecticut, in which State his will was admitted to probate. The executor afterwards obtained letters ancillary here, to reach effects in this State.
Held, that the executor could be called upon to account here only for such assets as the testator left in this State, and which were here at the time the letters ancillary were granted. *Lynes v. Coley*, 405.
7. The accounting of the executor here, is to be carried no further than may be necessary to enable our own citizens to secure their claims out of assets situate within our own jurisdiction; after which, and the payment of expenses, the further administration of the assets is to be left to the jurisdiction where the estate is to be finally closed. *Ib.*
8. An executor claimed credit, on his accounting, for moneys advanced to a sister of the testator in his lifetime.
Held, that the court might presume, after a long lapse of

- time,—*e. g.*, twenty-six years,—a request by the testator, and hold the estate responsible. But inasmuch as the executor had omitted to prove the claim within the statute period of limitation, the credit could not be allowed. *Broome v. Van Hook*, 444.
9. But moneys advanced to the sister as a legatee, after the death of the testator, though made out of the executor's private means, and not out of the estate, must be allowed as a charge against the estate. *Ib.*
 10. The payment by the executor of taxes accruing on the real estate, subsequent to the testator's death,—being for the benefit of the heirs,—the court, after a long lapse of time, will presume a request, and allow as a charge against the estate. *Ib.*
 11. After a lapse of upwards of twenty years, the court will presume that the executor, in paying a debt barred by the statute, had evidence of a new promise by the testator, and credit should be allowed accordingly for such payment. *Ib.*
 12. So, the payment of a judgment obtained against the executor on a demand barred by the statute, on proof of a new promise made by him,—*Held*, a proper charge against the estate. Every presumption must be given in favor of the executor, after a long lapse of time,—*e. g.*, twenty-one years,—that he had good and sufficient reasons for making the new promise. *Ib.*
 13. Where there is a conflict of testimony as to certain payments alleged to have been made to the widow by the executor, and no vouchers are produced,—*Held*, that such payments will not be allowed. *Ib.*
 14. The executor is not chargeable with dividends due the estate, not actually received by him, he having allowed such dividends to be retained in satisfaction of a debt due from the testator, even where such satisfied debt was barred by the statute. *Ib.*
 15. The rent of a pew in church, rented by the widow for the use of herself and the children, after the testator's death, is not a charge upon the personal estate, and cannot be allowed to her on her accounting as executrix. *Scott v. Monell*, 431.

See CONVERSION ; CREDITORS, *passim* ; ESTOPPEL, 1 ; EXECUTOR, 2, 3 ; EVIDENCE, *passim* ; HUSBAND AND WIFE, 1 ; INVENTORY, 1, 2.

ACTION.

See CONTEMPT, 2.

ADMINISTRATOR.

1. The order of right to administration in the city of New York is, first, the widow ; second, the next of kin ; third, the public administrator ; fourth, creditors ; fifth, any other person who will accept the same. In other counties, the treasurer, as public administrator, comes in next after creditors. *In re Root*, 257.
2. One having priority of right to the administration, can only deprive those coming after him of their right by taking letters himself. He cannot nominate a third party to the exclusion of the others. *Ib.*
3. Where letters of administration with the will annexed are granted, in a case where letters testamentary have never been issued, and there is no executor to take, or where the administrator with the will annexed dies, they issue to persons in the following order of preference : 1. Residuary legatees ; 2. Principal or specific legatees ; 3. The widow ; 4. Next of kin ; 5. The public administrator (in the city of New York) ; 6. Creditors ; 7. Any person not interested, who will accept. In other counties than New York, the county treasurer takes next after creditors. *In re Ward*, 254.
4. The provision of the statute (3 *Rev. Stat.*, 5 ed., 160, § 35), providing that where an application for administration is made by a person other than the one having the prior right, the applicant shall file a written renunciation of persons having such prior right, or a citation shall be issued to such persons to show cause—must be construed strictly. Nothing will satisfy the statute but a *written* renunciation, or a citation to show cause. *Barber v. Converse*, 331.
5. Thus, where letters of administration were granted to D. B. and A. B., who had the prior right, but were revoked on their failure to give new securities, and letters were subsequently granted to C., who was next entitled to them,—*Held*, that D. B. and A. B. were entitled to notice of the application of C. The failure of D. B. and A. B. to furnish new sureties, does not amount to a “written renunciation” within the meaning of the statute, nor does the previous notice or citation served on them to appear and file sureties, dispense with the necessity of service of a citation on them, upon C.’s application. *Ib.*
6. Where letters of administration have been irregularly issued, with-

out citing those having a prior right to the administration, they will be revoked. *Ib.*

7. An applicant for letters of administration will not be precluded from receiving them by reason of his intemperance, unless it be of such a gross character as would warrant overseers of the poor in designating him an habitual drunkard, under the Revised Statutes, or a jury in adjudging him so to be. *Elmer v. Kechele*, 472.
8. Where an executor is removed by a surrogate, the person succeeding to the administration is not chargeable with moneys collected by the former, or the value of chattels to whose use a legatee is entitled for life by the will. *In re Place*, 276.

See CONTEMPT, 1, 2; CREDITORS, *passim*; INVENTORY, 1, 2; LEGATEE, 1; MARRIAGE; MARRIED WOMAN; REAL ESTATE, 1, 2, 3, 4; SECURITY FOR DUE ADMINISTRATION, *passim*.

ANCILLARY (LETTERS).

See ACCOUNTING, 6, 7; JURISDICTION, 4, 5.

ANNUITIES.

See DISTRIBUTION, 1, 2.

APPEAL.

1. An appeal taken by an executor from a decree of the surrogate declaring the will null and void, stays all proceedings on the letters of administration subsequently granted to the widow, and no letters of collection can be issued upon them while the administration continues.

Held, therefore, that in order to enable letters of collection to be issued for the protection of the personal property pending the appeal, the letters of administration granted to the widow should be revoked. *Newhouse v. Gale*, 217.

ASSETS.

See CREDITORS, 5, 6; JURISDICTION, 4, 5.

ASSIGNMENT.

See COMPOUNDING A FELONY, 1, 2; JURISDICTION, 7.

ATTACHMENT.

See CONTEMPT, 1, 2.

BEQUESTS.

1. The testator, by his will, directed that in case of his widow's death without issue, a certain sum should be paid over to such five persons, residents of Addison county, Vermont, as should be named and appointed by the judges of the Supreme Court of Vermont, to be trustees, "to found, establish, and manage an institution for the education of females, to be located in the town of Middlebury, Vermont." After certain specific legacies, he bequeathed the residue of his estate "unto the five persons who shall be named as trustees by the Supreme Court of Vermont" for the same purpose. No time was given within which such appointment should be made, and no other mention of the institution, its object, or purpose, was given. The residue consisted of personal property, situated in this State, which was the testator's domicile at the time of his death.

Held, that the bequests were invalid. *Bascom v. Nichols*, 340.

2. Where a will bequeaths to the widow generally, all the personal estate for life, with remainder over, the whole must be converted into money and invested by the executor, and the income paid over to the widow. *Calkins v. Calkins*, 337.
3. The will read, "I give and bequeath to my beloved wife, Nancy, all my real estate, personal property, house, furniture, &c., to have and to hold as hers as long as she shall live; and after her death, the property that is remaining I request to be divided among my surviving children," naming them.

Held, that the bequest was general and not specific, and that the money in the hands of the executor, after payment of the debts, should be invested by him in permanent securities, and the income paid over to the widow. *Id.*

4. The testator bequeathed personal property to his executors, to be held in trust until his infant son should become of age, but made

no disposition of the income and profits that would arise from it before its distribution.

Held, that though the will did not in terms direct an accumulation, the direction led to that result, and the appointment of a time for the division was void. *Scott v. Monell*, 491.

See DISTRIBUTION, 5.

CAPACITY (TESTAMENTARY).

See WILLS, 14, 15, 16, 17, 18, 28.

COLLECTOR.

On a petition by a special collector appointed during a contest on the probate of a will, for an order directing the sale of certain personal property alleged to belong to the estate, it appeared that the property in question was in the actual possession of a person claiming to be the widow of the decedent, who also claimed title to it on the ground that she had loaned the decedent the money with which the property was purchased.

Held, 1. That the paper propounded as the decedent's will, could not be resorted to for evidence as to the title.

2. Without trying the absolute title of the property, the surrogate must determine the probable ownership.

3. Although the probable title was in the estate, yet the surrogate would not order a sale of property which was not actually in the hands of the representative of the estate; but would direct the collector to bring suit to test the title. *Libby v. Christy*, 465.

See APPEAL, 1.

CITATION.

See PRACTICE AND PLEADING, 7.

COMPOUNDING DEBTS.

The provisions of chapter 80 of the Laws of 1847 (3 *Rev. Stat.*, 5 ed., 174, § 29),—authorizing surrogates to compound debts belonging to an estate,—do not apply to demands against solvent debtors. *Howell v. Blodgett*, 323.

COMPOUNDING A FELONY.

1. An assignment by a married woman of all her interest in the estate of a deceased person, in consideration of the assignee's forbearing to arrest the assignor's husband for an embezzlement of his funds, and a promise to continue him in his employment, and pay his salary to her,—*Held*, void for want of a legal consideration. The fact that part of the consideration was legal will not sustain the agreement. *Decker v. Morton*, 477.
2. An agreement to forbear arresting a person, will be presumed to mean either a criminal or civil arrest. *Ib.*

CONSTITUTIONAL LAW.

It seems, that the general regulations for the descent and transmission of property, in case of the death of the possessor, to his widow, heirs, and next of kin, cannot be regarded as constituting a contract with them, so as to bring those laws within the prohibition of the Constitution of the United States, nor as vesting the expectants, under such laws, with rights or privileges within the meaning of the Constitution of the State. *In re Lawrence*, 310.

CONSTRUCTION (OF WILLS).

See BEQUESTS, 3, 4; DISTRIBUTION, 2, 3, 4, 5; LEGACY, 1, 2; SUSPENSION OF POWER OF ALIENATION, 1, 2, 3.

CONTEMPT.

1. The surrogate has no power to direct and control the conduct of executors and administrators in other courts. *Beebe v. Hatch*, 475.
2. Thus, where the surrogate granted an order enjoining the executor from further action as executor, until the conclusion of a controversy then pending; and notwithstanding such order, the executor began an action in his own name as executor, in the Supreme Court;—*Held*, not a contempt of court, for which the surrogate would direct an attachment to issue. *Ib.*

CONVERSION.

Though a power to sell, for the purposes of distribution, be an entire conversion of land into money; yet, if one of the distributees die before actual conversion, the conversion, so far as his representatives are concerned, is not complete, and the executor is accountable for the proceeds only to his heir, and not his personal representatives. *In re Vandervoort*, 270.

See JURISDICTION, 2.

CREDITORS.

1. At common law, neither the admissions of an executor or administrator, nor a judgment against him, can in any way bind the heir or devisee, or affect the real estate derived from his testator or intestate. *Colson v. Brainard*, 324.
2. Upon the hearing of an application of the administrators for authority to sell so much of the real estate of the intestate as may be necessary to pay his debts, it is competent for a devisee of the real estate in question, or any person claiming under him, to contest the legality or validity of a judgment obtained against the administrators, like any other claim or demand against the estate. The judgment is only *prima-facie* evidence of the debt of the intestate, and, like all other *prima-facie* evidence, is liable to be controverted, impeached, or entirely disproved by any competent evidence. *Ib.*
3. The devisee being let in to contest the judgment, it was ordered that it be sent to the circuit on an order for a trial, under section 72 of the Code of Procedure. *Ib.*
4. The provision of 2 Rev. Stat., 116, § 19,—authorizing a creditor, having a judgment against an executor or administrator, to obtain an order against the executor or administrator to show cause why an execution should not issue on such judgment,—does not refer solely to judgments for debts of the deceased. But a creditor having a judgment against an administrator for legal services rendered him in the administration of the estate, is entitled to such an order. *Cowles v. Thompson*, 490.
5. An administrator having funds in his hands to which he is lawfully entitled to resort for the payment of the just and necessary expenses of the administration, cannot refuse so to apply the fund,

on the ground that there is not sufficient assets to satisfy in full all the debts of the estate. *Ib.*

6. Thus, where, on an accounting by the administrator, it appeared that there were assets of the estate sufficient to satisfy a judgment obtained against the administrator for legal services rendered in the administration, and to pay all other probable expenses of the administration, although not enough to pay more than a proportion of all the debts;—*Held*, that a decree will be granted that the administrator pay out of the estate the amount of the judgment, with interest and costs. *Ib.*
7. In order to make the judgment a "debt" against the estate, within the meaning of the statute, so that it must abate with the other debts due from the estate, in consequence of the deficiency of assets, it would be necessary that the services for which the judgment was obtained should have been rendered to the testator in his lifetime. *Ib.*
8. *It seems*, that if the creditor shall so require, the surrogate may proceed further, and direct that an execution issue. (Per LEONARD, J.) *Ib.*
9. Medical attendance upon the deceased being valuable, the law presumes a promise to pay; and in order to defeat the claim, affirmative evidence that such service was gratuitously rendered must be produced. *In re Scott*, 234.

See ADMINISTRATOR, 1, 3.

DEBTS.

See COMPOUNDING DEBTS, 1; CREDITORS, 7; EXECUTORS, 2; JURISDICTION, 1; LIMITATIONS (STATUTE OF), 1, 2.

DESCENDANTS.

Brothers and sisters cannot take under the term "descendants." The term does not mean next of kin, or heirs at law generally, but it means the issue of the body of the person named of every degree, as children, grandchildren, and great-grandchildren. *Hamlin v. Osgood*, 409.

DESCENT.

See CONSTITUTIONAL LAW.

DISTRIBUTION.

1. The will directed the whole estate to be converted into money, and, among other provisions, out of the fund, directed a certain sum to be invested, the interest of which was to be paid to the wife, but without expressing it to be in lieu of dower; and another sum to be invested, and the interest paid to his adopted daughter.

Held, 1. That whether these provisions are legacies or annuities, they are general, and are subject to abatement with the other general legacies of the will.

2. That no time being stated for the payment of the interest to the widow and adopted daughter, the widow is not entitled to interest until one year from the grant of letters; but that the adopted daughter is entitled to interest from the death of the testator, he standing in *loco parentis*, and there being no other provision for her maintenance. *In re Williams*, 208.

2. The testator directed that, after the payment of his debts and a certain annuity to U., all his real and personal property should go to his widow for life. One of the debts against the estate was in the nature of a life annuity to N. H.

Held, 1. That both these annuities should be paid out of the principal, and not out of the income, of the estate.

2. That after the payment of the annuities, debts of the estate, expenses of administration, and funeral expenses, the balance should be invested in permanent securities, and the net income and rents and profits paid to the widow. *Haven v. Haven*, 374.

3. The testator bequeathed \$500 to his sister, A. L., "to be received, or the interest thereof, as I have hereinafter designated;" but did not, in any manner, designate his further intention in regard to the bequest, but appointed a trustee for her. The remainder of the estate was directed to be divided among four other legatees, who should "share equally and alike, and enjoy the benefits and emoluments resulting therefrom;" and a trustee was appointed for one of these last legatees, who was a minor.

Held, that no trust was created by the will, and that the several legatees were entitled to be paid, on the distribution, the principal of the estate as well as the income. *Morrell v. Simons*, 349.

4. The gift is absolute. The four legatees are tenants in common, under the gift of "the benefits and emoluments," to use the prin-

cial and interest; except that on the death of one, the remainder of his share unused goes to the survivors. *Id.*

5. The testator devised all his estate to his executors in trust, to sell it in such parcels, and at such times, as they should think proper; and authorized them, until such sales were made, to receive the rents and profits. He then directed, that upon the converting of all his estate, real and personal, into money, it should be divided into ninety equal parts, specifying how many parts were to be paid to the several legatees. He also directed that in case of the death of any legatee "before the division of my estate, leaving descendants," the share of such legatee should go to said descendants, in such portions as they would be entitled to, if such deceased person had died intestate, fully possessed of the same.

Held, 1. In view of the discretion allowed to be exercised by the executors, the court will not presume that the testator contemplated the division of the whole estate at an earlier period than it really occurred, except where unreasonable delay or an unwarrantable abuse of the trust are shown.

2. The event upon which the bequests were limited, was the final division of the testator's estate; and the legacies did not vest until that event took place. Therefore, when one of the legatees died before the final division took place, the limitation over to his descendants took effect at his death; and his share should be paid to them, and not to his administrator.

3. The widow of said legatee was not, therefore, entitled to any portion of her husband's share. She is not included in the term "descendants," and can take no part in the distribution as such. *Hamlin v. Osgood*, 409.

See CONVERSION; LEGACY, 2.

DOMICIL.

1. A man does not lose his established domicile, and acquire a new one, while his absence is compulsory, or is dependent upon the happening of any contingent event; yet where a person in ill health is convinced that he cannot live in the climate of his domicile here, and he removes from it,—*Held*, not to be such a compulsory absence, continuing his domicile here, as that a change of domicile may not be established by proof of a fixed intention to abandon it, and to become a permanent resident of some other place. *Hegeman v. Fox*, 297.

2. The deceased, being in ill health, sold his house and furniture, and closed up his business here, and departed for the South, declaring that "he never expected to return; that he expected to make the South his home." He purchased, stocked, and cultivated a plantation in Florida, whither he removed, and lived with his family for over a year, and until his death.

Held, that the domicile of the deceased, at the time of his death, was in the State of Florida; and the widow was entitled to one-third of the personalty, according to the laws of that State. *Ib.*

3. The question is one of intent, and not whether the deceased was compelled to change his domicile by reason of ill health. *Ib.*
4. The construction and validity of a trust, although for purposes to be carried out in another State, are governed by the laws of the State in which the testator resided at the time of making his will, and at his death. *Bascom v. Nichols*, 340.
5. The rule that the law of domicile governs, applies to the manner and form, conditions and limitations, of the gift, equally with its object. *Ib.*

See BEQUESTS, 1; JURISDICTION, 4, 5, 6.

DONATIO MORTIS CAUSA.

1. The deceased was in his last illness, suffering from an incurable disease; he had just made his will, and every thing tended to show that he was in present apprehension of death.

Held, that under such circumstances, a gift of his horses, furniture, wearing apparel, and watch, was a gift *mortis causa*, and not *inter vivos*. *Delmotte v. Taylor*, 417.

2. The policy of the law is against gifts *mortis causa*; and to sustain them, the most clear, circumstantial, and satisfactory proof will be required. *Ib.*
3. To constitute a valid *donatio mortis causa*, there must be, if the gift is by parol, an actual delivery and acceptance of the thing, so far as it is possible. The mere fact that it has passed into the possession of the donee, even by the act of the donor himself, is not enough. *Ib.*
4. However apparent the intention of the deceased to make a gift, such intention of itself is unavailing to sustain it. *Ib.*
5. The deceased, in his last illness, expressed a desire to his daughter that she should have his carriage and horses, but did not request

her to take possession of them, nor direct the stable-keeper to deliver them to her; nor did it appear that there had been any actual transfer or change of possession, though they were used by her afterwards, and the coachman received his orders from her.

Held, not such a delivery by the donor to the donee, as was necessary to complete the gift. *Ib.*

6. So, where the deceased gave his daughter the furniture in his rooms, the keys to which were given her by her husband, and she subsequently removed the furniture to her residence, though nothing else appeared showing that she took possession of it with the donor's knowledge and assent,—*Held*, not sufficient to consummate the gift. The fact that the furniture was in the donee's possession before the donor's death, is not, of itself, sufficient to warrant the presumption that there was an actual delivery. A mere taking possession is not sufficient. It should appear to have been done with the knowledge and acquiescence of the donor. *Ib.*

ESTOPPEL.

An heir at law, who, upon an accounting of the administrator, knowingly receives from the court in which such accounting is had, a certain sum as his share of the proceeds of land sold by such administrator, is estopped, in equity, from denying the validity of the sale. *In re Place*, 276.

See INVENTORY, 2.

EXECUTOR.

1. The power of an executor at common law is confined to personal estate. An executor has power over real estate, *ratione officii*, in three cases only. 1. Where no trustee to sell is named, and the proceeds of land sold are to pay debts and legacies. 2. In cases under the provisions of the Revised Statutes (2 *Rev. Stat.*, 109, § 55), permitting a sale by those executors alone who have proved a will. 3. In cases where the survivorship of a naked power to sell is in question, where one of several donees of it, also made executors, remained. *In re Place*, 276.
2. An executor has the authority, as the successor and legal representative, to sell a debt of the testator; and such sale having been

made in good faith, prudently and discreetly,—*Held*, that he should not, in equity, be held liable for more than he received. *In re Scott*, 234.

3. A receiver of the "debts, property, equitable interests," &c., of the executor appointed in proceedings supplementary to an execution, has not such an interest in the estate of the deceased as entitles him to an accounting by the judgment-debtor, as executor. *Worrall v. Driggs*, 449.
4. The interest of the executor in the assets of the estate is not vested until an accounting is had, so as to be subject to the lien of an execution. *Ib.*
5. Statutory provisions conferring on administrators with the will annexed the right of exercising powers of sale given to executors—stated. *In re Place*, 276.

See CONTEMPT, 1, 2; CREDITORS, *passim*; INVENTORY, 1.

EVIDENCE.

1. On an accounting, one of the executors offered himself as a witness to prove that certain property had never been in the actual possession of the executors, but had been given by the testator in his lifetime to his daughter (the wife of the witness), who was also a residuary legatee under the will.

Held, that the testimony offered was not in violation of the common-law rule, that a husband cannot give testimony in favor of his wife, and must be admitted. *Sneckner v. Taylor*, 427.

2. Books of account, introduced as evidence of indebtedness of the deceased, are not conclusive. They should be sustained by other corroborating proof, as far as possible; and where kept in the form of a ledger, although a book of original entries, and some of the charges are written on erasures, and others appear to have been altered after they were first made, but little credit is due them. *Lloyd v. Lloyd*, 399.
3. Declarations of a wife tending to show an existing intent and disposition to unduly influence her husband in procuring the execution of his will,—*Held*, admissible. *Julke v. Adam*, 444.
4. Greater reliance is to be placed upon the testimony of an impartial and respectable lawyer, in regard to the due execution of a legal instrument, than upon that of a non-professional witness. *Ib.*

See CREDITORS, 1, 2, 9; HUSBAND AND WIFE, 2; MARRIAGE, 1, 2, 9.

FRAUD AND UNDUE INFLUENCE.

See EVIDENCE, 3; PRACTICE AND PLEADINGS, 1, 8; WILLS, 18-27.

GIFTS.

See DONATIO MORTIS CAUSA.

GUARDIAN AND WARD.

1. In appointing a guardian of the estate of a minor, the best interests of the minor are alone to be consulted, and the surrogate is not restricted in his appointment to the relatives. He may appoint a stranger, who is shown to be competent.

So held, where all the relatives of the minor, excepting the mother, united in a consent to the appointment of the stranger. *Holley v. Chamberlain*, 333.

2. The policy of the law is against the appointment of married women as guardians of the estate of minors. And where the mother of the minor is living with a second husband, though otherwise competent, she will not be appointed guardian of his estate. *Ib.*
3. Where a father, by an instrument in writing, surrendered his infant children to the custody of a charitable institution, with the powers and subject to the provisions contained in its act of incorporation,—*Held*, that notwithstanding such surrender, the surrogate may appoint a general guardian of the children. The obligations of such a guardian are not inconsistent with the guardianship which the institution may claim under the act of its incorporation. *Kearney v. Brooklyn Industrial School*, 292.
4. A guardian foreclosed a mortgage, which he held in trust for his wards, in obedience to an order of the surrogate; which also directed that out of the proceeds of the sale or foreclosure, he should pay over the sum due to one of the wards, who had come of age. At the sale under the foreclosure, the guardian, to prevent a sacrifice of the property, bought it in as guardian.

Held, that he must account to such ward for the amount of his bid. *Burtis v. Brush*, 448.

See MARRIED WOMEN.

HUSBAND AND WIFE.

1. The testator, in his lifetime, gave his wife certain real estate, which she held in her own name, subject to the joint bond of the husband and wife, with the mortgage by the wife, given for the purchase-money. The husband died, leaving the bond unpaid, and, by his will, appointed his widow executrix, who paid off the bond with the funds of the estate.

Held, that she was not entitled to be credited for the amount thus paid, in her account as executrix. *In re Williams*, 208.

2. Parol evidence that at the time of making the bond and mortgage, and subsequently, the testator declared his intention to pay off the incumbrance, and give the property to his wife unincumbered,—*Held*, inadmissible. *Ib.*

EVIDENCE, 1 ; MARRIAGE, *passim*.

INFANTS.

1. The consent of infant heirs cannot be made the ground of any order which may prejudice their rights. *Scott v. Monell*, 431.
2. Thus, the written consent of the heirs (two of whom are infants), that an outstanding mortgage on a farm, devised by the testator to the widow, should be paid out of the personal estate, or that the widow should have the use of a certain sum of money during her pleasure, is invalid, and does not relieve the widow from her liability, as executrix, to account therefor. *Ib.*
3. The contract of an infant may be avoided by those only, besides himself, who are privy in blood or estate. *Nelson v. Eaton*, 498.
4. C., an infant, by a deed of gift, granted to his sister all his right, title, and interest in and to his father's estate, and died before attaining his age. His brother W. assigned all his interest, both in his father's and in C.'s estate, to N.

Held, that N. had such an interest in the estate as entitled him to disaffirm C.'s deed, on the ground of infancy. *Ib.*

INTEREST.

See DISTRIBUTION, 1.

INVENTORY.

1. An inventory is an act of the administrator or executor, to the correctness of which he is sworn, particularly as to all claims against himself; and, therefore, if an administrator inventories, among the assets of the intestate, a promissory note, executed by himself to the deceased, without making any claim of set-off to the same in the inventory, this circumstance, unless satisfactorily explained, is, in connection with other adverse facts, suspicious; and in a case where it appeared, from the preponderance of testimony, that the items of the account constituting the set-off existed before the delivery of the note,—*Held*, that the omission was evidence against the same, independent of the legal presumption of a settlement between the parties as to all prior matters.

Held further, that this rule applies to the whole demand, in a case where the claim of the administrator exceeds the amount. *Lloyd v. Lloyd*, 399.

2. Whether, as to a demand, thus inventoried, the administrator or executor is not estopped from setting up a defence in bar, such as satisfaction, payment, &c., which operates to discharge or extinguish the claim—*Query?* *Ib.*

JUDGMENT.

See ACCOUNTING, 12; CREDITORS, 1, 2, 3, 4, 6, 7, 8.

JURISDICTION.

1. The surrogate has not the jurisdiction to try or to establish a disputed debt. He can only determine the fact whether the debt be established or not. *In re Jones*, 263.
2. At common law, the spiritual courts had no jurisdiction over real estate or its proceeds; and the provisions of 2 *Rev. Stat.*, 110, § 57, and *Laws of 1837*, 536, § 75,—giving the surrogate power in such cases,—only apply where there is an out-and-out conversion, and not where a mere discretionary power to sell or to make division is given. *In re Vandervoort*, 270.
3. A power of sale, where the grantees of such power have authority to make such partition as they deem best, is not an imperative

power or an out-and-out conversion, as will give the surrogate jurisdiction. *Ib.*

4. It is a general rule, that a beneficiary who seeks the payment of a legacy must resort to the jurisdiction of the State or country where the testator was domiciled at the time of his death, where letters testamentary were originally granted; and that payment of it will not be decreed by a foreign tribunal, out of assets situate within its jurisdiction, which are under administration ancillary. *Lynes v. Coley*, 405.
5. But, *it seems*, that where it is shown that no injury can arise to creditors or legatees, from decreeing the payment of a legacy, the surrogate may require its payment out of assets situate within the jurisdiction where the legatee resides. *Ib.*
6. The fact that the testator died in another State, where proceedings were taken and letters testamentary granted, before any proceedings were had on the will here, does not prevent the surrogate having jurisdiction to prove the will, where assets are shown to be here. The offer to show that the testator was a non-resident and a non-inhabitant of this State, refused. *Gilman v. Gilman*, 354.
7. An assignee of the distributive share of one of the next of kin, having neglected to bring an action on the assignment, and left the administrator to settle his accounts with the assignor, cannot afterwards ask the surrogate to try its validity on the accounting of the administrator. *Decker v. Morton*, 477.

CONTEMPT, 1, 2; PRACTICE AND PLEADING, 1, 2.

LEGACY.

1. The testatrix died February 6, 1856, and among other legacies in her will, she bequeathed a certain sum to the Troy Conference Academy, at West Poughkeepsie, Vermont. On the 12th day of January, 1857, the trustees of the academy executed a lease to a private individual for nine hundred and ninety-nine years, at a nominal rent, it being fully provided that the lessee should "carry on the school contemplated by and in the charter, or acts incorporating the same, according to all the conditions of said acts of incorporation."

Held, that the legacy became vested in the academy on the death of the testatrix; and whether the subsequent execution of

the lease operated to dissolve the corporation or not, the fact of such previous vesting controlled the course of the legacy, and entitled the academy thereto. - *Wesleyan University v. Troy Con. Acad.*, 287.

2. The testator directed a certain sum to be invested by his executors, the income thereof to be paid to his parents during life; and on the death of both, out of the sum so invested, to pay \$2,500 to the testator's brother. The brother died before either parent.

Held, 1. That the legacy to the brother, consisting of personal property, and being chargeable on the personal estate, vested from the testator's death; and, on the death of both parents, should be paid to the legatee's personal representative.

2. The gift was not payable on the happening of a contingent event. The mere postponement of the actual possession of a legacy affixes no condition to its actual vesting. *Larocque v. Clark*, 469.

See DISTRIBUTION, 5; JURISDICTION, 4, 5.

LEGATEE.

- A legatee who is named as executor in a will which has been declared null and void by a decree of the surrogate, and who has appealed from such decree, has sufficient interest in the estate to enable him to make an application for the removal of the administratrix, on the ground of her marriage since her appointment. *Newhouse v. Gale*, 217.

See ADMINISTRATOR, 3; PROBATE.

LIMITATIONS (STATUTE OF).

1. An administrator or executor who neglects to take proceedings provided by statute to prove his debt or claim against the estate of the deceased for more than ten years, is barred by the Statute of Limitations. *In re Rogers*, 231.
2. The Legislature having required him to make proof of his claim, before he can retain in satisfaction of his own claim, the same vigilance should be required from him in establishing his claim as from any other creditor of the estate. *Id.*

See ACCOUNTING, 8, 11, 12, 14.

MARRIAGE.

1. Cohabitation and reputation are circumstances from which a marriage in fact may be inferred; but these circumstances do not of themselves constitute a marriage. They are evidence merely of a marriage contract, which may be rebutted by other testimony. *Davis v. Brown*, 259.
2. Thus, where A. B., the deceased, and C. D. had cohabited together as man and wife, at a place of public resort, during two summers, and had taken a house in town under an assumed name, but they were not publicly recognized or known as man and wife among the family relatives and friends,—*Held*, that the presumption of marriage was rebutted by the confession of C. D., that she was not married to the deceased. Letters could not, therefore, be granted to her on the ground that she was the widow of the deceased, though on her application for letters she had sworn positively that she was such widow. *Ib.*
3. The nullity of a marriage, voidable merely, must first be pronounced by a court of competent jurisdiction, before the fact of its invalidity can be taken advantage of in any proceeding. If not declared void, it remains good and legal for all purposes, and either party surviving the other has a prior right to letters of administration. *White v. Lowe*, 376.
4. Where a woman, whose husband had been absent for more than five successive years, without being known to her to be living, and was reputed to be dead, cohabited with the intestate, and lived with him as his wife for twenty years, until his death; and the first husband, though living, had not obtained a decree annulling the second marriage;—*Held*, that the woman was the widow of the intestate, and was entitled to letters of administration on his estate, in preference to all others claiming them. *Ib.*
5. The fact that the abandonment was on the part of the wife, and not of the husband, can make no difference. The mere fact of *absence*,—where it does not appear that it was created with a view of avoiding the statute,—is sufficient, without reference to the manner, or the reason, or occasion of it. *Ib.*
6. Under the Laws of 1830, ch. 320, § 28, a marriage, though not performed in accordance with the Revised Statutes, is not for that cause illegal. *Ib.*
7. Where a wife abandoned her husband, on account of his intemper-

ate habits, cruel treatment, and absence from home, and during five successive years resided in an adjoining county, with a second husband, and it did not appear that she had knowledge of the death of her first husband, or that he was not generally well known to be living,—*Held*, not such a continuing absence for five successive years, within the provision of 2 Rev. Stat., 139, § 6, as to render valid the second marriage, and authorize the issuing of letters to the woman as the widow of the second husband. *Wyles v. Gibbs*, 382.

2. There should be a *bona-fide* absence of the absconding person from the State, and without being known to the other party to be living; or, at least, there should be such an absence from the county as would preclude the idea that he was living, after the most careful and diligent inquiry had been made. *Id.*
3. Proof of an earlier ceremonial marriage rebuts a presumption of marriage founded on reputation, cohabitation, and social recognition. *Decker v. Morton*, 477.

MARRIED WOMEN.

The policy of the statute is against the appointment of married women as administratrices or guardians, and of their continuation in office after their marriage subsequent to the issuing of the letters; but *it seems* that such subsequent marriage of an administratrix is no ground for her removal where her husband files his consent to her continuance in office, and unites with her and the sureties in a new bond. *Newhouse v. Gale*, 217.

See GUARDIAN AND WARD, 2.

MINOR.

See GUARDIAN AND WARD, *passim*; INFANTS, *passim*.

MORTGAGE.

See GUARDIAN AND WARD, 4; HUSBAND AND WIFE, 1, 2; INFANTS, 2.

NEXT OF KIN.

See ADMINISTRATOR, 1, 3.

PARTNERSHIP.

On an application that the executors file an inventory, and give security for the due administration of the estate, a motion for an order that the executors deposit with the surrogate the books of a copartnership composed of the deceased and one of the executors, so as to enable the next of kin to ascertain the amount of the interest of deceased in such copartnership, will not be granted. The surviving partner being entitled to the custody of the books of the firm, ought not to be compelled to give them up. *Waring v. Waring*, 205.

PERSONAL ESTATE

See COLLECTOR.

PEW.

See ACCOUNTING, 15.

POWER.

An authority to executors to sell real estate in a certain contingency, and divide the proceeds among certain specified persons, does not vest the estate in the executors. It is simply a power, and the land passes at once to the devisees, subject only to the execution of the power. *Scott v. Monell*, 491.

See CONVERSION; JURISDICTION, 3; REAL ESTATE, 1.

PRACTICE AND PLEADING.

1. In the absence of any proof of fraud, or mistake, or accident, a decree rejecting a will propounded for probate, will not be opened on the grounds that the counsel engaged were incompetent, or that the attesting witnesses, not being familiar with the English language, did not, on the hearing, fully understand questions put to them in that language, as to the due execution of the instrument propounded. The proper remedy is by appeal. *Dobbs v. Munro*, 486.

2. When the surrogate's decree refusing probate will be opened—stated. *Ib.*
3. In a proceeding in the surrogate's court, the original decree is the paper signed by the presiding officer of the court, written out on a sheet or sheets of paper. *Ib.*
4. The record or minutes, kept in pursuance of the statute, is merely the enrolment of the decree, which should conform to the original decree, and may be made to do so on motion. No signature is required to this record. *Ib.*
5. An original decree is not irregular and void merely because the title of his office is not affixed to the name of the acting surrogate signed to it. *Ib.*
6. On proceedings for probate of a will, a claim of interest positively sworn to, will make the claimant a contestant before the court, and a party to the proceedings. *Norton v Lawrence*, 473.
7. The appearance of an interested party in open court, on the return-day, though not served with citation, entitles him to be heard. *Ib.*
8. Objections to the probate of a will, on the ground of its undue execution, being filed by certain infants claiming to be legitimate grandchildren of the deceased, it is not necessary to try the question of the interest of the objectors before proceeding to the question of the due execution. The issue of interest, and the issue of due execution, do not constitute separate and distinct proceedings. *Ib.*
9. The Surrogate's Court is always open. The absence of the surrogate, or of the parties, on an adjourned day, does not abate the proceedings or put the case out of court. *Gilman v. Gilman*, 354.
10. Mere absence of an attesting witness from the State, abroad on a journey or tour, does not authorize proof of the will by proving the handwriting of the testator and of the witness. To entitle such testimony to be given, the witness must reside out of the State. *Stow v. Stow*, 305.
11. The statute providing for such proof, where all or any of the witnesses "reside" out of the State (3 *Rev. Stat.*, 5 ed., 139, 140, §§ 9, 12), imports something more than mere absence from the State. The word should be taken in its broadest legal signification, and means actual residence, without regard to domicil. *Ib.*

See CREDITORS, 3.

PROBATE.

A legatee under a will made prior to the one offered for probate, who is neither an heir-at-law nor next of kin of the deceased, may intervene to oppose the probate of the subsequent will. *Turhune v. Brookfield*, 220.

See JURISDICTION, 6 ; PRACTICE AND PLEADING, 2.

PUBLIC ADMINISTRATOR.

See ADMINISTRATOR, 1, 3.

REAL ESTATE.

1. The authority granted to an administrator by the surrogate, to sell, considered merely as authority, is analogous to a power in trust to sell, as distinguished from a trust. It is a judicial decree that the lands be sold to pay the intestate's debts, as well as a judicial mandate to the administrator to execute the decree. His duty is similar to that of a sheriff on execution, and is strictly analogous to that of a master in chancery on executing a decree of sale, and he is vested with a like discretion with them. *In re Lawrence*, 310.
2. Such an order of sale having been made, the administrator should be left free to execute it, and an application by an assignee of a creditor for an order directing the administrator to execute the order of sale in full, by selling all the land embraced in the order and not sold, will be denied. The proper remedy is by attachment, to enforce the order of sale already decreed. *Ib.*
3. The administrator is bound to show a sound discretion as to the mode of conducting the sale. He is not bound to consummate the sale, if, for any reason, it might be set aside by the surrogate on the ground of unfairness. *Ib.*
4. The fact that the widow has embarrassed a sale attempted under the order, or that it is probable that she will do so again, by spreading false reports as to the title being subject to her dower, —*Held*, not good cause to suspend the sale under the order. *Ib.*

See ACCOUNTING, 5 ; CREDITORS, 2 ; EXECUTOR, 1 ; JURISDICTION, 2, 3 ; POWER, 1.

RENUNCIATION.

See ADMINISTRATOR, 4, 5.

RESIDENCE.

See PRACTICE AND PLEADING, 11.

REVERSION.

1. L. C. devised premises to the intestate, "if he should live until he is twenty-one, or marry:" in case of his death under twenty-one, unmarried, then to V. The intestate died under twenty-one, unmarried.

Held, 1. The fee had vested in the intestate, and was not contingent upon his arrival at the age of twenty-one, or his marriage.

2. The rents and profits accruing between the vesting of the fee and the death of the intestate belonged to him, and the remainder thereof left unexpended were assets in the hands of his administrator, to be accounted for.

3. The rents and profits accruing after the death of the intestate went with the fee to V. *Kelso v. Cuming*, 392.

9. But where certain personal property was bequeathed to the intestate, on the same terms, to be held *in trust* for him until he was twenty-one,—*Held*, that V. took the property either as next of kin of L. C., or by the will. *Ib.*

See BEQUESTS, 2, 3.

REVOCATION OF WILL.

1. A mere intention to revoke a will never effectuates an express revocation. The most satisfactory evidence that the testator had repeatedly and explicitly declared a deliberate design to annul or destroy his will, previously made, would not authorize the court to reject the instrument. A written statement to that effect, in the testator's handwriting, is not a valid revocation, unless celebrated according to the forms prescribed by the statute. *Delafield v. Parish*, 1.
2. A legal act of revocation must be performed *animo et facto*. There must concur, both the intention and the act. Intention or mere

purpose, to become legally operative, must be expressed in a legal way. To design to do, and to do, are not the same. The act implies and embraces the intention, but the mere naked intention does not include and comprise the act. *Ib.*

3. At common law there could be a revocation of a will implied from circumstances.

There were two classes of such implied revocation :

1. Such as were declared by the law, in view of a change in the testator's circumstances, especially his family relations, since the execution of the will, and which effected a total revocation of the will and all its dispositions. This class was received in consideration by the probate courts. It was, accordingly, an established rule that marriage and the birth of issue effected an implied revocation of a previous will.

Ultimately the birth of children (without a subsequent marriage after the will was made), in conjunction with other alterations in the testator's circumstances, was held sufficient to establish an implied revocation.

An alteration in the testator's circumstances, when that alteration did not include, as one of its essential ingredients, either marriage or the birth of issue, has never been held to revoke a previous will.

2. The second class of implied revocations at common law were revocations by alienation of property, or such acts of the testator in regard to his property as indicated an intention to exempt it from the dominion of the will. These revocations were implied from the testator's dealing with the property, which was the subject of testamentary gift, and their extent was consequently commensurate with the dealing. This class of revocations only affected the property devised, and did not produce a revocation of the will *per se*; and therefore such cases never came within the purview of the probate courts. *Ib.*

4. The whole subject of implied revocation in the State of New York is now controlled by statute, and no implied revocations are admitted except those enumerated in the Revised Statutes. *Ib.*
5. Proof that a will, subsequent to the one offered for probate, was made and duly executed and published by the testator, although the subsequent will cannot be found, and is not, therefore, offered,—*Held*, sufficient ground for refusing probate to the one offered. *Moore v. Griswold*, 388.
6. The complete destruction or cancellation of a will, is not necessary

to constitute its revocation. A destruction of it, as complete as was in the testator's power in his infirm health, is sufficient; the testator being of a sound mind, and the act being *animo revocandi*. *Sweet v. Sweet*, 451.

7. The testator tore his will into several fragments, which were carefully collected by his wife, and sewed together in such a manner that the instrument was perfectly legible when propounded for probate. The testator was of sound mind, though in infirm health, at the time of the tearing, and expressed satisfaction at its destruction.

Held, that there was a valid revocation of the will. *Ib.*

SECURITY FOR THE DUE ADMINISTRATION OF THE ESTATE.

1. The proponent, who is also the executrix, and a legatee under an alleged will of the testator, of a later date than that already admitted to probate, has such an interest in the estate of the deceased, pending proceedings on the probate of the paper propounded by her, as entitles her to petition for an order compelling the executrix of the will already admitted, to give security or be superseded. *Cunningham v. Souza*, 462.
2. The "due administration of the estate," for which an executor gives security, consists in paying its obligations, and handing over the balance to the persons entitled. *Ib.*

STAY OF PROCEEDINGS.

See *APPEAL*.

SUSPENSION OF POWER OF ALIENATION.

1. A direction in a will that the executors invest a certain sum of money in the purchase of real estate, in their own names, in trust, and apply the income of it to the support and maintenance of the widow during her life, and to the support and education of two infant children, until they should become of age,—*Held*, void, as suspending the power of alienation for a longer period than that of two lives in being. A limitation upon minorities is a limitation upon lives. *Scott v. Monell*, 431.
2. Such a direction is not rendered valid by a subsequent provision

- of the will, that upon the death of the widow the sum so directed to be invested should become a part of the residuary estate. *Ib.*
3. It can make no difference whether or not any further limitation would be cut off by the widow's death during the minority of the children. The existence of a possibility that the trust might be carried over beyond two lives, is sufficient to render it invalid. *Ib.*

TAXES.

See ACCOUNTING, 10.

TREASURER (OF COUNTY).

See ADMINISTRATOR, 1, 3.

TRUST.

Where a will creates a trust of the rents of real estate for the benefit of a family, "while they continue such," and there is no similar trust of the proceeds of the sale of such lands, under a power contained in the will, such power, though not limited in terms, cannot be exercised until the family is broken up. *In re Vandervoort*, 270.

See BEQUESTS, 4; DISTRIBUTION, 3; DOMICIL, 4, 5; REVERSION, 2; REAL ESTATE, 1; SUSPENSION OF POWER OF ALIENATION, 1, 2, 3.

VESTING OF LEGACIES.

See DISTRIBUTION, 5; LEGACY, 1, 2.

WILLS.

1. Where a will appears, on its face, to have been duly executed and published as a last will and testament, in the presence of three witnesses, and after a lapse of thirty-five years, the witnesses being dead, their signatures and that of the testator are proved, and other facts appear indicating care and circumspection attendant upon the execution of the paper,—*Held*, that it will be presumed that all the other formalities required by law, for the

of the testator that the instrument which the testator has subscribed is his last will and testament. If this is done, it is a substantial compliance with the statute; and nothing less than this will do. *Ib.*

14. The will of a competent testator stands as the reason for the act, and requires no other evidence to support it than proof of due execution according to the ceremonies prescribed by law. *Delafield v. Parish*, 1.
15. But a different degree and class of proof are required where the will has been made by the intervention of one profiting by its provisions and occupying relations of confidence and influence towards a testator of weak or doubtful capacity. For example, where the parties are in the relation of guardian and ward, principal and agent, trustee and *cestui que trust*, attorney and client, the court is exact and scrutinizing in its requisition of the plainest evidence of volition and capacity. Where such relations of confidence exist, and the party frames the instrument for his own advantage and benefit, every presumption arises against the transaction. In such a case, it is not necessary to prove fraud and circumvention, but the proponent must remove the suspicion by clear and satisfactory proof.

The principle involved in this rule must be considered as relating rather to the *quantum* of evidence required in such cases, than to an actual conclusion of fraud in fact. *Ib.*

16. And, in its application, it requires from the proponent evidence outside of the document itself that the contents were understood by the decedent, and were conformable to his real wishes; that the act was the result of free volition, the actual will (*voluntas ipsa*) of a competent mind; and if from any cause such proof fail, probate must be denied. *Ib.*
17. Where the testator made with due deliberation, and under legal advice, his will, in the year 1843, whereby, after providing for his wife and making other legacies, he made his two brothers residuary legatees, the residue at the time being small; and subsequently, in 1849, when such residue had increased very largely, and he had made no change in the will, was seized with apoplexy, and after a partial recovery, and the exhibition of some degree of intelligence, he made a codicil in favor of his wife, proved to have been conformable, in a measure, to intentions expressed previous to his illness,—*Held*, that such codicil should be admitted to probate. *Ib.*

Held, also, in respect to subsequent codicils, not supported by any extrinsic evidence of intention prior to his illness, which were made in favor of his wife, while he was in her charge, his faculties were enfeebled and impaired, and his power of communication and mental manifestation greatly affected, that the proof in support of such codicils was deficient, and they should be denied probate. *Ib.*

18. Undue influence in procuring a will may not only be proved by direct evidence of importunity, or the practice of arts upon the decedent, but may be presumed from facts;—which throws upon the party propounding it for probate, the burden of establishing free agency and understanding of the contents of the instrument. *In re Welsh*, 238.
19. Proof of prior instructions corresponding with the contents of a will, or complete recognition of every part of it as the free act of the decedent, is indispensable in every case of diminished mental power, accompanied by suspicious circumstances as to the origination and execution of the instrument. Mere acknowledgment of the will is not sufficient; it must appear to be the result of the decedent's own suggestions, freed from any influence. *Ib.*
20. The rector of a church which is residuary legatee in a will, who has the nomination to two scholarships created by it in a theological seminary, who procured the will to be drawn, was named therein as sole executor thereof, and superintended its execution, is a person so benefited by it as to require an investigation as to its *spontaneous* character. Such an interest, under the common law, only makes a legacy presumptively void, although under the civil law it was absolutely void. *Ib.*
21. The relation of spiritual adviser, where the person holding it procures a will to be drawn, and superintends its execution, by which a church in which he is interested is benefited, raises enough of a presumption of undue influence to require proof of spontaneity or volition to repel it. *Ib.*
22. Part of a will may be refused probate in consequence of undue influence in regard to it, and the residue admitted. The same rule prevails as in case of incompetency or fraud as to such part. *Ib.*
23. Where suspicions of undue influence are created by reason of the advanced age, blindness, and imbecility of the testator,—*Held*, that a presumption is raised against the will, which requires that they be removed by clear and satisfactory evidence, beyond the

mere fact of the existence of the will and the capability of the testator.

Held, further, that such presumption is satisfactorily removed by proof of the instructions given by the testator in regard to the drawing of his will; that the same was carefully read and explained to him at the time of its execution, and that he subsequently declared every thing was arranged to his satisfaction. *Turhune v. Brookfield*, 220.

24. The influence to vitiate an act must amount to force and coercion, destroying free agency. It must not be the influence of affection and attachment, nor the desire of gratifying the wishes of another. The proof must be, that the act was obtained by coercion; by importunity that could not be resisted; that it was done merely for the sake of peace, so that the motive was tantamount to force and fear. The natural influence of a wife, arising from her relations with the testator, without proof of any specific acts, will not amount to such coercion. *Clarke v. Davis*, 249.
25. The testator was aged, and his mental capacity greatly impaired by habitual intemperance. In the presence of his wife, he directed that his will, drawn according to former instructions, should be changed; "that he wanted to satisfy his wife, and it must be drawn as she desired it." The wife then gave directions as to the particular disposition of property, especially that two-thirds, instead of one-half, should go to her. It appeared that the wife had for some time directed the intentions and controlled the acts of the testator.

Held, that probate must be denied. *Julke v. Adam*, 454.

26. Where no failure of memory was exhibited at the time the will was executed, and the testator is not shown to have had any disease of the brain which permanently impaired his mental faculties,—*Held*, that the facts of his old age, declining health, and his failure to recollect or understand certain transactions, do not prove a want of mental capacity to make a will. *Clarke v. Davis*, 249.
27. A statement made by the testator after the execution of a codicil, to a daughter whom he had therein disinherited, that he had given her the sum of \$600, and no such sum appeared in the will,—*Held*, not sufficient to prove a want of capacity. The capacity of a testator to make a will must be determined by what happened at its execution, and not what afterwards occurred. *Ib.*

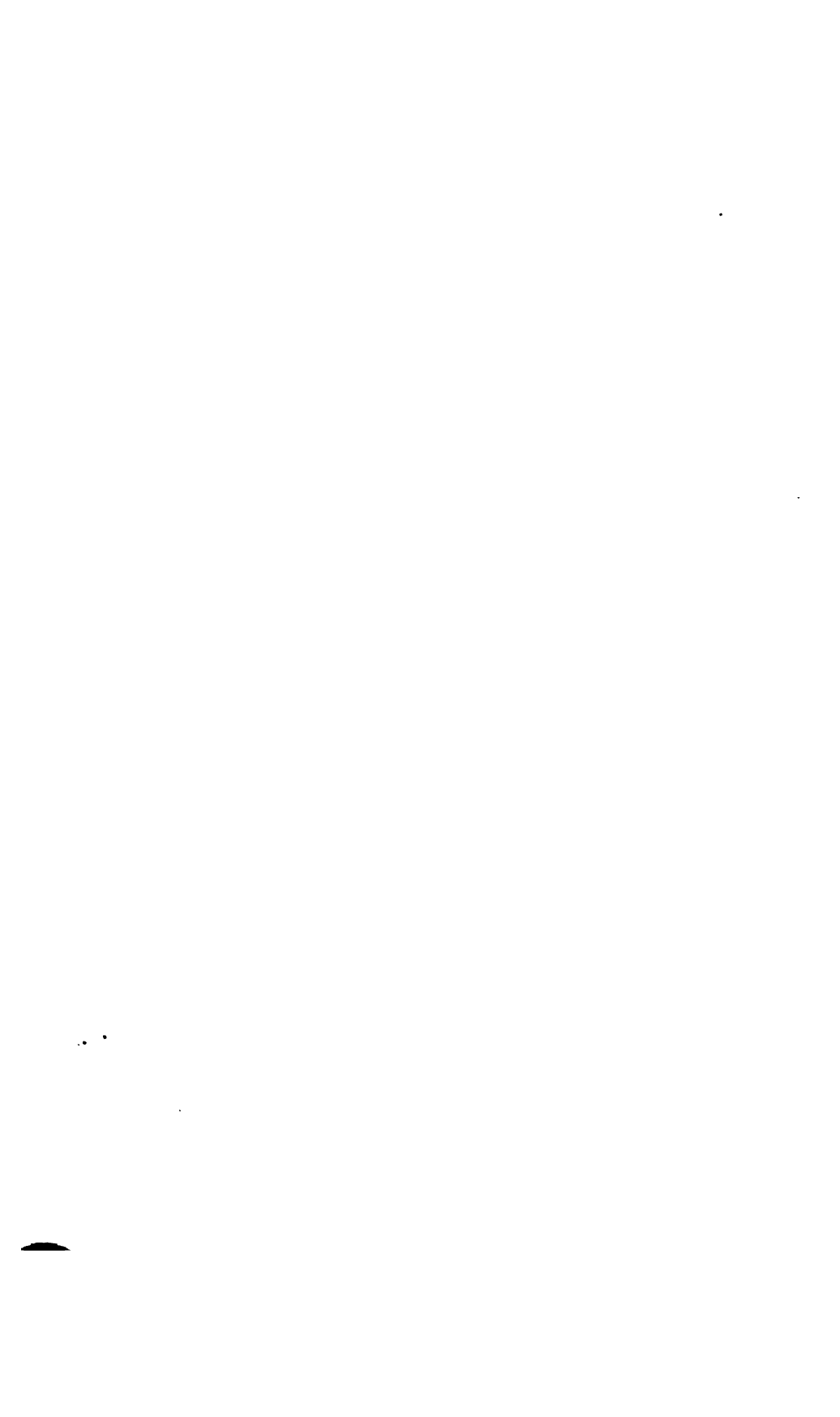
28. Evidence of habits of intemperance, and occasional fits of wildness, though indicating an impaired mind,—*Held*, not sufficient to establish a total and permanent want of testamentary capacity. *Julke v. Adam*, 454.

See PRACTICE AND PLEADING, 11; REVOCATION, *passim*; LEGACY, *passim*; BEQUEST, *passim*; DESCENDANTS, 1.

THE END.

J. R. S. C.

7-19-22





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